Study H-851 July 24, 2003

Memorandum 2003-31

Alternative Dispute Resolution Under CID Law (Comments on Tentative Recommendation)

In December 2002, the Commission approved a tentative recommendation on *Alternative Dispute Resolution in Common Interest Developments*. It was circulated for public comment and we received a number of letters, which are included in the Exhibit as follows:

Some of the letters touch on subjects that are not directly related to the tentative recommendation. Those issues will be noted for future consideration, but are not addressed in this memorandum. Note that the Executive Council of Homeowners (ECHO) comments on AB 512 (Bates), which implements a Commission recommendation on procedural fairness in CID decisionmaking, are directed at an earlier version of the bill and do not necessarily reflect ECHO's current position on the bill.

After considering the issues discussed in this memorandum, the Commission should decide whether to adopt a final recommendation based on the tentative recommendation or request the staff to prepare a draft recommendation for consideration at another meeting.

Unless otherwise indicated, all statutory references in this memorandum are to the Civil Code. **This memorandum supersedes Memorandum 2003-18 and its First Supplement.**

SUMMARY OF PROPOSED LAW

The proposed law would make three general changes to existing law. It would:

(1) Improve existing Section 1354 which requires that the parties "endeavor" to submit a dispute to some form of ADR prior to litigation.
(2) Require that associations offer an optional dispute resolution procedure to their members, at no cost to participants.
(3) Establish a statewide CID information center.

The tentative recommendation discusses, but does not recommend, establishment of a governmental regulatory program for dispute resolution.

PRE-LITIGATION ADR

In a dispute involving enforcement of an association's governing documents, the parties must "endeavor" to submit their dispute to a form of alternative dispute resolution, such as mediation or arbitration, as a prerequisite to litigation. See Section 1354(b). Though it is required that ADR be offered, the parties need not agree to participate.

However, there is an incentive to participate in ADR. In a civil action to enforce an association's governing documents the prevailing party is entitled to recover reasonable attorney's fees and costs. See Section 1354(f). In determining the amount of the award, the court "may consider a party's refusal to participate in alternative dispute resolution prior to the filing of the action." *Id.*

Obviously, there can be obstacles to successful use of the existing ADR process — the cost of hiring a neutral, possible intransigence of the parties, and the relative inequality of bargaining power between individual homeowners and the association's board of directors (which can draw on the resources of the association to finance litigation). Nonetheless, the existing pre-litigation ADR mechanism provides an alternative to litigation that could be useful in some cases.

The proposed law would make the following improvements to Section 1354:

(1) Provide that homeowners may enforce any of an association's governing documents, not just the declaration. **Objections to this proposal are discussed below.**

(2) Extend the application of the pre-litigation ADR requirement to include actions to enforce the Davis-Stirling Common Interest Development Act ("Davis-Stirling Act") and the Nonprofit Mutual Benefit Corporation Law. Many aspects of CID governance are covered by those statutes. If pre-litigation ADR is beneficial in a dispute over an association's governing documents it should also be beneficial in a dispute over applicable statutory requirements. **There were no objections to this proposal. The staff recommends that it be included in the Commission's final recommendation.**

(3) Extend the application of the pre-litigation ADR requirement to include actions for writ relief. Writ relief is an important vehicle for enforcing rights in the CID context. It should also be subject to pre-litigation ADR. **There were no objections to this proposal. The staff recommends that it be included in the Commission's final recommendation.**

(4) Extend application of the attorney's fees and costs provision to include actions to enforce the Davis-Stirling Act and the Nonprofit Mutual Benefit Corporation Law. **Objections to this proposal are discussed below.**

(5) Improve the manner of service of a request for dispute resolution. Existing Section 1354 provides for service of the request in the same manner as service in a small claims action (i.e., by action of the court clerk, by personal delivery, or by substituted service on the sheriff). The proposed law provides a more straightforward method, which would permit service by first class mail. **There were no objections to this proposal. The staff recommends that it be included in the Commission's final recommendation.**

(6) Replace the existing confidentiality language with a provision incorporating the Evidence Code provisions governing mediation confidentiality. **This proposal is discussed further below.**

(7) Reorganize and recast the existing statute to make it easier to use and understand. **There were no objections to this proposal. The staff recommends that it be included in the Commission's final recommendation.**

The proposed law does not require that actual participation in ADR be made a prerequisite to litigation. However, the Commission will review the results of recent pilot projects that would permit the Los Angeles Superior Court to make mandatory referrals to mediation in selected cases. See Code Civ. Proc. §§ 1730-

1743. A Judicial Council report on the pilot projects was due on January 1, 2003, but has not yet been released. Judicial Council expects to release the report in early 2004.

Homeowner Enforcement of Governing Documents

Strictly speaking, Section 1354(a) isn't an ADR provision. It simply establishes the underlying authority to enforce the covenants and restrictions that are contained in an association's declaration. The ADR provisions have broader application, applying to all "governing documents" (which include the declaration as well as the articles, bylaws, and operating rules). The proposed law would broaden the enforcement authority provided in Section 1354(a) to match the scope of the ADR provisions:

> The covenants and restrictions in the declaration shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development. Unless the declaration states otherwise, these servitudes and governing documents adopted pursuant to them may be enforced by any owner of a separate interest or by the association, or by both.

The proposed change would be redundant with respect to the association's enforcement authority. Existing Code of Civil Procedure Section 383 already recognizes the standing of a homeowners association to sue to enforce its governing documents. The more significant effect of the proposed change would be to recognize the authority of individual owners to enforce the governing documents.

The Executive Council of Homeowners (ECHO) objects to that change, citing:

> [The] centuries-old principle (correctly articulated and embodied in existing Civil Code section 1354(a) with respect to the "declaration") that permits any owner of property that is benefited by a covenant running with the land, to enforce it. However, the Commission's proposal is an extraordinary extension of that principle to a corporate board of directors' rules, of unlimited kinds. First impression tells us this is wildly inappropriate. At the very least, the concept demands an examination of its consequences to community life, the social and financial costs, and why owner's existing legal remedies to compel the board to enforce (or change) its rules are not sufficient.

See Exhibit p. 40.

Consequences to Community Life

ECHO's comments suggest that owner enforcement of the articles, bylaws, or operating rules would have a deleterious effect on community life. Presumably, ECHO's concern is that owners would attempt to police each other's conduct to an offensive degree. Owner enforcement raises the specter of a flurry of accusations and counter-accusations between neighbors, based more on personal animosity than on the good of the community as a whole.

Enforcement Against Association

While owners might resent being policed by their peers, the right of owners to enforce the governing documents against the association itself is fundamental. There is no other enforcement mechanism. Despite this, the Davis-Stirling Act does not clearly authorize owner enforcement of the governing documents against an association.

However, there is case law in which owners have sued to enforce an association's governing documents (other than the declaration). See *Kaplan v. Fairway Oaks Homeowners Ass'n,* 98 Cal. App. 4th 715 (2002), in which owners sued to enforce voting rules provided in their association's by-laws. There is also case law recognizing that an owner may sue an association for failing to enforce the declaration: "Under well-accepted principles of condominium law, a homeowner can sue the association for damages and an injunction to compel the association to enforce the provisions of the declaration." *Posey v. Leavitt*, 229 Cal. App. 3d 1236, 1246 (1991). It would probably be helpful if these principles were clearly stated in the Davis-Stirling Act.

Perhaps Section 1354 could be amended as follows:

> 1354. (a) The covenants and restrictions in the declaration shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development. Unless the declaration states otherwise, these servitudes may be enforced by any owner of a separate interest or by the association, or by both.
>
> (b) <u>The governing documents of the association may be enforced against the association by an owner of a separate interest.</u>
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> …
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> **Comment**. …Subdivision (b) makes clear that an owner may enforce the association's governing documents against the association. See, e.g., *Kaplan v. Fairway Oaks Homeowners Ass'n,* 98 Cal. App. 4th 715 (2002) (owner suit for violation of association

> bylaws). This includes the right to bring an action against an association for failure to enforce the governing documents. See, e.g., *Posey v. Leavitt*, 229 Cal. App. 3d 1236, 1246 (1991) ("Under well-accepted principles of condominium law, a homeowner can sue the association for damages and an injunction to compel the association to enforce the provisions of the declaration.").

It isn't strictly necessary that we address this issue as part of the recommendation on ADR. It appears that the existing practice is to allow such suits, probably in reliance on the case law. However, it would be helpful at some point to provide clearly stated statutory authority. The staff invites public comment on whether the provision set out above would be helpful or would somehow create new problems.

Recommendation

The staff shares ECHO's concern about owners directly enforcing rules of conduct on other owners. It would seem more conducive to good community relations for enforcement to be left to the elected board or its agents. They at least have a duty of considering the welfare of the association as a whole. The existing right of owners to sue an association to compel enforcement of the governing documents does provide a remedy if a board improperly refuses to enforce the governing documents. **The staff recommends that the language in the proposed law providing for owner enforcement of the governing documents be deleted.** The staff is inclined to add language codifying the right of owners to enforce the governing documents against the association itself.

Attorney Fee Shifting

Existing Section 1354(f) provides for an award of reasonable attorney's fees and costs to the prevailing party in an action to enforce an association's governing documents. The provision really has two elements: a provision for awarding fees to the prevailing party ("fee shifting"), and a provision for setting the amount of the fee award ("fee calculation"). The fee calculation element specifically authorizes the court to consider a party's refusal to participate in pre-litigation ADR in setting the amount of the fee award.

The proposed law would broaden the application of both elements, so that they would apply in any action to enforce the Davis-Stirling Act or the Nonprofit Mutual Benefit Corporation Law. See proposed Sections 1369.510, 1369.580.

ECHO has concerns about the proposed change:

> Broadly extending attorneys' fees in Section 1354 to the enforcement of the Davis-Stirling Act and, an even more complex notion, to enforcement of the entire Nonprofit Corporation Law is an extraordinary proposal, hardly minor. Sweeping away the American Rule can have serious consequences for all potential litigants. We are aware of no other segment of California's citizenry or of nonprofit corporations that are subject to a similar scheme. While we take no formal position on this at the moment, we urge the Commission to request a full briefing on the subject and to give this proposal the exploration and discussion that it deserves.

See Exhibit p. 40.

ECHO's objection seems directed to the broadening of the fee shifting element (i.e., the proposed broadening of the types of actions in which fees can be awarded to the prevailing party). It isn't clear that ECHO objects to the broadening of the fee calculation element, which would only apply where there has already been a decision that fees are to be awarded. Various issues relating to attorney fee awards are discussed below.

Attorney Compensation in California

Code of Civil Procedure Section 1021 provides:

> Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties…

In other words, the default rule in California is the "American Rule" — absent an agreement or statute to the contrary, each party bears its own cost of representation. See Code Civ. Proc. § 1021.

There are many statutory exceptions. Some provide for two-way fee shifting, with "the prevailing party" entitled to an award of attorney's fees from the loser. Section 1354(f) is an example of two-way fee shifting statute. Other statutes provide for preferential fee shifting, with preference given to one of the parties. For example, Government Code Section 6259(d) provides for an award of fees to a plaintiff who prevails in an action to compel production of a government document under the Public Records Act. A defendant agency is only entitled to fees if "the court finds that the plaintiff's case is clearly frivolous."

Case law also recognizes an equitable exception for an action to create, protect, or compel distribution of a common fund.

> Under a rule long established in equity courts, where a number of persons are entitled to a common fund, and an action is necessary to create, protect or compel distribution of it, one who brings the action for the benefit of all is entitled to payment of his attorneys' fees out of the fund. "The bases of the equitable rule which permits surcharging a common fund with the expenses of its protection or recovery, including counsel fees, appear to be these: fairness to the successful litigant, who might otherwise receive no benefit because his recovery might be consumed by the expenses; correlative prevention of an unfair advantage to the others who are entitled to share in the fund and who should bear their share of the burden of its recovery; encouragement of the attorney for the successful litigant, who will be more willing to undertake and diligently prosecute proper litigation for the protection or recovery of the fund if he is assured that he will be promptly and directly compensated should his efforts be successful." (*Estate of Stauffer* (1959) 53 C.2d 124, 132, 346 P.2d 748, infra, 218.)

7 B. Witkin, California Procedure *Judgment* § 215, at 747-78 (4th ed. 1997).

The common fund exception has been successfully invoked in shareholder derivative suits. *Id.* A homeowner suing an association to protect the common property of the association might plausibly argue for application of the common fund exception. The staff could not find any case in which such an application of the exception is discussed.

Rationales for Fee Shifting

Fee shifting statutes can serve a variety of purposes. For an interesting discussion of the different rationales for attorney fee shifting, see Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 Duke L.J. 651 (1982). Professor Rowe identifies a range of rationales for enactment of a fee shifting statute. The most straightforward rationales relate to the simple equity of making the party at fault bear the cost of litigation and making the injured party whole. Fee shifting may also serve a punitive purpose, to deter certain types of misconduct or punish those who engage in it. For example, Code of Civil Procedure Section 128.5 authorizes an award of attorneys fees incurred by a party "as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." Fee shifting can also deter nuisance litigation, by making the plaintiff bear the full cost of a meritless suit.

Perhaps most interesting for our purposes are the "private attorney general" and "unequal strength" rationales. Under the private attorney general theory, a

fee shifting statute facilitates socially beneficial litigation that might not otherwise be pursued, due to the inadequacy of plaintiff's resources. "They also frequently involve situations in which governmental authority or resources do not suffice to assure adequate public enforcement…." Rowe at 662.

The unequal strength rationale is relevant when there is a regular imbalance between the resources of the parties:

> When one side in a particular type of litigation regularly has the advantage of superior resources, holding out the prospect of reimbursement of fees can improve the position and stiffen the resolve of the relatively weaker side. … [When] a legislature perceives a regular imbalance, it can seek to match adversaries more evenly by adopting some form of fee shifting to prevent disproportionate advantage in access to and use of the legal process.

Rowe at 665-65.

Both rationales seem relevant in the context of enforcing CID law. The Commission has previously noted the structural imbalance of resources between a homeowners association board and individual homeowners. The board can draw from the resources of the association as a whole to finance litigation, while individual owners have only their personal resources available. This constrains individual homeowner access to courts, while leaving association access relatively unconstrained.

The problem of unequal resources would be less acute if there were a state agency with authority to regulate association board conduct, but there is no such agency. The Attorney General has some discretionary authority to regulate compliance with the nonprofit corporations law, but lacks the resources to do so in a meaningful way. The lack of meaningful state regulation and the difficulty that individual homeowners face in financing litigation provides association boards with a degree of insulation from accountability. Some form of fee shifting would help redress that problem, by providing an alternative source of funding of meritorious homeowner suits.

Existing Section 1354(f) already provides for two-way fee shifting in an action to enforce an association's governing documents. The question before the Commission is whether some form of fee shifting should be provided in actions to enforce the Davis-Stirling Act and the Nonprofit Mutual Benefit Corporation Law.

Discussion

As a general concept, the idea of providing for attorney fee shifting in an action to enforce the statutory elements of CID law has appeal. Many of the details of CID governance are spelled out by statute. Enforcement of those provisions may depend on private homeowner suits.

For example, Section 1363.05 establishes the "Common Interest Development Open Meeting Act." That section regulates the manner in which board meetings may meet, requiring a certain level of openness in their proceedings. The requirements of that section must be enforced by owner lawsuit if they are to be enforced at all.

Section 1363.05 is roughly analogous to the Ralph M. Brown Act, requiring open meetings of local government entities. A successful plaintiff in an action to enforce the Brown Act is entitled to attorney's fees. See Gov't Code § 54960.5. A homeowner suing to enforce the open meeting requirements of Section 1363.05 would seem to be on a nearly identical footing and should probably also be entitled to fees.

It should also be noted that an association's governing documents can address exactly the same types of issues that are governed by provisions of the Davis-Stirling Act or the Corporations Code. This means that fees might be awarded in one case but not in another, despite the fact that both cases address the same subject matter, merely because the rule at issue in the first case is stated in the governing documents, while the rule at issue in the second is stated in statute. *Kaplan v. Fairway Oaks Homeowners Ass'n*, 98 Cal. App. 4th 715 (2002), provides a concrete example of this problem. In that case, homeowners were suing in part to enforce their right to proxy voting in the election of directors. If that action had been brought to enforce the proxy rules stated in the association's bylaws, attorneys fees would be awarded. If, on the other hand, the action was brought to enforce the proxy rules stated in Corporations Code Section 7613, attorneys fees would not be awarded.

ECHO objects that it would be extraordinary to extend fee shifting on such a broad basis. However, existing law provides examples of fairly broad fee shifting provisions. See, e.g., Civil Code §§ 52 (violation of Unruh Civil Rights Act), 798.85 (violation of Mobilehome Residency Law); Code Civ. Proc. § 1028.5 (suit by small business or licensee against state regulatory agency); Gov't Code § 91012 (violation of Political Reform Act).

Enforcement of the Nonprofit Mutual Benefit Corporation Law presents issues similar to those discussed above. That statute governs many aspects of homeowners association governance. There is no effective state enforcement of those requirements. If it makes sense to shift fees in enforcing the governing documents, why not shift fees in enforcing governing provisions of the Corporations Code?

One counter argument is that the Nonprofit Mutual Benefit Corporation Law represents a deliberate compromise between protecting the interests of individual corporation members and preserving the management efficiency that is crucial to protecting the interests of the corporation as a whole. In limited areas, the Legislature has determined that fee shifting is appropriate. See, e.g., Corp. Code § 8337 (award of fees to prevailing plaintiff if corporation's failure to comply with records inspection request was without justification). In other areas, there is no fee shifting. See, e.g., Corp. Code § 7511(c) (no fee shifting in action to compel distribution of notice of special member meeting). A blanket fee shifting provision would upset that arguably deliberate balance.

On the other hand, a homeowners association is not a typical nonprofit corporation. In a CID, it is the members' homes and lifestyles that are at stake. By contrast, in a typical nonprofit corporation, a member's interest may consist of nothing more than a small annual membership fee. The consequences of board mismanagement in a CID are probably much more significant and personal than in the typical nonprofit corporation.

There may also be more of a commonality of interests and expectations in a typical nonprofit corporation, whose officers and members have come together voluntarily to serve some common purpose. In a CID, the members are thrown together by geographical happenstance and may want nothing more than to be left alone.

Common sense also suggests that a typical nonprofit corporation will search for board members who have experience serving on corporate boards and therefore have a good understanding of a board's powers and responsibilities. A CID must choose its board members from among its own ranks, which may not include anyone with prior experience in managing a corporation.

These differences in character between a CID and a typical nonprofit corporation may justify a different approach to compensation of attorneys fees in actions to enforce the requirements of the Corporations Code.

Fee Shifting Alternatives

The staff sees the following alternative approaches to addressing the fee element of the proposed law:

(1) *Preserve the status quo.* Revise the fee shifting element to refer only to an action to enforce the governing documents.

(2) *Broaden the fee shifting provision, as in the proposed law*. There are persuasive rationales for fee shifting in any type of dispute between homeowners and the association board. Two-way fee shifting provides a more level playing field in CID disputes, while discouraging meritless nuisance suits against the board of directors.

(3) *Broaden the fee shifting provision and make it preferential.* The described rationales for fee shifting may be strong enough to justify preferential fee shifting. For example, in an action against the association, the homeowner could be entitled to fees on "prevailing", while the defendant association would only be entitled to fees if the plaintiff's case is "clearly frivolous" (similar to the rule provided under the Public Records Act and the Ralph M. Brown Act).

(4) *Pursue the fee shifting issue on a separate track.* Broadening the scope of fee shifting is likely to be controversial with organizations representing association boards and is not really required as part of a reform of the pre-litigation ADR requirements.

The staff favors the fourth alternative. The fee shifting proposal is worth pursuing but should be studied on a separate track, so as not to draw opposition to the proposed ADR reforms.

There is another good reason for separate study of the fee shifting issue. To avoid causing any unintended consequences, we would need to be careful to examine every type of cause of action that might arise in enforcing the Davis-Stirling Act or the Nonprofit Mutual Benefit Corporation Law in the common interest development context, to determine whether a fee shifting rule should apply. For example, should fee shifting apply in a construction defect action brought by an association against a developer? There would also be a measure of cleanup work required (e.g., deletion of superseded fee shifting provisions in the Davis-Stirling Act). Rather than delay the ADR portions of the proposed law while these matters are examined, it would seem to make sense to set the fee shifting issue on its own track.

If the Commission decides to keep the fee shifting provision in the proposed law, it should probably be modified along the following lines:

> 1369.580. ~~The~~ Except where a statute provides a different rule for recovery of attorney's fees and costs, the prevailing party in an enforcement action shall be awarded reasonable attorney's fees and costs. On motion for attorney's fees and costs, the court, in determining the amount of the award, may consider a party's refusal to participate in alternative dispute resolution before commencement of the action.
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> **Comment**. … The rule providing for an award of reasonable attorney's fees and costs to the prevailing party is subordinate to any other statute that provides a different rule on recovery of attorney's fees and costs. For example, Corporations Code Section 8337 provides an award of attorneys fees to a plaintiff if the defendant's conduct was "without justification" and does not provide for an award of attorney's fees to a prevailing defendant. That rule would prevail over the rule provided in Section 1369.580.

That qualification would avoid running roughshod over any existing specially-tailored attorney fee provisions.

Fee Calculation

Regardless of whether the fee shifting provision is broadened, it makes sense to broaden the fee calculation provision. That rule should apply to any action that is subject to pre-litigation ADR under the proposed law.

For the purposes of the ADR recommendation, the staff recommends that proposed Section 1369.580 be revised as follows:

> 1369.580. ~~The prevailing party in an enforcement action shall be awarded reasonable attorney's fees and costs. On motion for attorney's fees and costs~~ In any enforcement action in which fees and costs may be awarded, the court, in determining the amount of the award, may consider a party's refusal to participate in alternative dispute resolution before commencement of the action.

The fee shifting language, in whatever form the Commission recommends, should be kept as part of Section 1354. It would probably fit better in an article titled "Enforcement" than in an article titled "Alternative Dispute Resolution."

ADR Confidentiality

Ms. Vanitzian comments that association boards routinely breach the confidentiality of ADR communications. "It matters not what the law states regarding such communications — they are consistently breached with devastating results." See Exhibit p. 3.

Ms. Vanitzian's observation may be explained in part by the fact that Section 1354(g)-(h) does not provide for blanket confidentiality of communications made in the course of ADR. Those subdivisions provide that such communications are inadmissible as evidence in a civil action and testimony or disclosure of the communications cannot be compelled, except with the consent of both parties. This limitation on the use of ADR communications *as evidence in civil litigation* is helpful, but does not equate to full confidentiality.

The proposed law would replace Section 1354(g)-(h) with a provision that expressly incorporates the Evidence Code provisions on mediation confidentiality. See proposed Section 1369.540(b) (incorporating Evid. Code § 1115 *et seq.*). Evidence Code Section 1119(c) provides:

> All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

This provides broader confidentiality than is provided by Section 1354(g)-(h) and may help address the problem described by Ms. Vanitzian. **The staff recommends that this provision of the proposed law be included in the Commission's final recommendation.**

Voluntary v. Mandatory ADR

A range of views were expressed on the question of whether actual participation in ADR should be required as a prerequisite to litigation. Mr. Robino believes that "anything that is not mandatory will not affect the current state of associations" and that the proposed improvements to the existing voluntary ADR provision "would be ineffective at best." See Exhibit p. 31.

Ms. Vanitzian argues against mandatory ADR: "Alternative Dispute Resolution was meant to be a **voluntary alternative** to rigorous courts, rules, attorneys and rising fees. … Denying even **ONE** homeowner his/her right to bring suit in a court of American law because of the imposition of **mandatory** Alternative Dispute Resolution, in my opinion is unconstitutional." See Exhibit p.

3 (emphasis in original). The Congress of California Seniors would have "strong concerns" about any proposal to make ADR mandatory. See Exhibit p. 24.

We also received comments that express general support for the overall approach taken by the Commission. See, e.g., remarks of Sarah Calderon, Executive Director of the Berkeley Dispute Resolution Service, at Exhibit p. 26.

The staff believes that the Commission was correct in recommending that the existing voluntary ADR approach be maintained and refined, rather than replaced with a mandatory ADR provision. That approach can be revisited once the Judicial Council report on the mandatory mediation pilot projects is available for analysis.

INTERNAL DISPUTE RESOLUTION PROCESS

If disputants have directly opposing goals or a history of bad faith dealings with each other, then a neutral mediator of some type is probably required in order to resolve the dispute. However, some disputes arise from simple miscommunication or from a perception that a person's views are not being heard and taken seriously. In such cases, it may be possible to resolve the dispute through an internal process, without involvement of a neutral.

The proposed law would require that associations provide a fair, reasonable, and expeditious internal dispute resolution mechanism at no cost to the members. If an association fails to provide its own procedure, a statutory meet and confer procedure would apply as a default. Under that procedure, the board would appoint one of its members to meet with the homeowner and hear the complaint. That board member would be empowered to settle the matter on the spot.

If a homeowner invokes the procedure, the association would be required to participate, but a homeowner would never be required to participate. Use of the internal procedure would be available *at the option of the homeowner.* See proposed Sections 1363.830(b)-(c), 1363.840(b)(2).

The procedure would supplement, rather than replace, the existing pre-litigation ADR provisions. See proposed Section 1363.810(b).

Efficacy of Internal Dispute Resolution

The Congress of California Seniors is concerned about the proposed default "meet and confer" procedure:

> As we understand it, the essence of ADR is that a neutral mediator negotiate the settlement between the two disputing parties. In CIDs, the dispute is frequently between the board itself and the property owner. So any ADR system controlled by one of the disputants — i.e., the board — is doomed to fail. The dispute should be resolved through a mediator external to the HOA itself, e.g., to a community-based dispute resolution program.

See Exhibit p. 24.

Exclusive reliance on an internal dispute resolution procedure to address disputes between homeowners and the board would be problematic. However, the proposed law would require that the internal dispute resolution be available as an additional alternative, not as an exclusive remedy. The staff believes that internal dispute resolution would provide a useful alternative and **should be included in the Commission's final recommendation.**

Neighbor to Neighbor Disputes

As drafted, the internal dispute resolution procedure would apply to a dispute between members of an association, regardless of whether the association is itself a party to the dispute. Under the default procedure, the association could be required to participate in resolution of a neighbor to neighbor dispute. Proposed Section 1363.840(a)(3). That provision is modeled on New Jersey law, which mandates that planned real estate developments "shall provide a fair and efficient procedure for the resolution of disputes between individual unit owners and the association, *and between unit owners*, which shall be readily available as an alternative to litigation." N.J.S.A. 45:22A-44(c) (emphasis added). The staff could not find any cases or articles discussing experience under that provision.

We received a number of comments objecting to use of the internal dispute resolution process to resolve disputes that don't involve the association. Ms. Franco writes, at Exhibit p. 33:

> I am against having Board members be required to assist in the resolution of neighbor to neighbor disputes for the following reasons:
>
> 1. It is difficult to recruit Board members now without requiring them to do additional work.
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> 2. The board should concentrate on the affairs of the Association as a whole not homeowner to homeowner disputes. This could be very time consuming especially in a large association.

3. Some neighbor to neighbor disputes cannot be resolved due to the unreasonable demands of the parties combined. If this law passes, a Board member would need to respond to the constant requests from members asking for resolution when there is none.

The Board members of the Associations that I manage are very willing to help to resolve differences between homeowners in the community. There are some differences that cannot be resolved because of the individuals involved. Board members have many responsibilities to its members as a whole without being required to act as a policeman, mediator or free counselor. There are plenty of other people and agencies that are better equipped to assist in resolutions.

Please do not add unnecessary burdens to individuals who are volunteering to do a relatively thankless job.

G. Perrin raises similar points, at Exhibit pp. 35-36:

I was recently made aware of a proposed amendment to the [Davis-Stirling Act] to require an individual Board member to resolve neighbor to neighbor disputes. I for one have been an active member of my homeowner's association and now currently serve as Vice-President of the Board for my association. I would like to express to you that having had the benefit of both vantage points I find no reason to involve ANY member of the Board in neighbor-to-neighbor disputes and my reasons are as follows:

1. Homeowners who serve on the Board are already taxed with the tasks of running the business of the association i.e., they have a fiduciary duty to exercise sound judgment in acting as stewards of the association's finances and overseeing the day-to-day operations vis-a-vis the management of the association's property/assets. It would be an unjust burden if the law imposed on Board members the weight of acting as a mediator between neighbors. Such a legislation I think would have a "chilling effect" and deter homeowners from serving on Boards as it would be stressful and it would impinge on their personal lives and well-being.

2. Most Boards are comprised of homeowner's who volunteer their time and to ask members of a Board to resolve disputes is really extending the Board's liability because their error or omission or assurances could become the focus of any later litigation that [may] arise out of the dispute between neighbors. Members of most Boards do not possess the skill nor do most have the legal knowledge and expertise to know what pitfalls to avoid when trying to resolve disputes between neighbors therefore, it is really not wise for them to act in the capacity of a mediator.

3. There will be instances where there [may be] a conflict of interest between the Board member mediating the dispute and the

> person(s) involved in the dispute, in which case the Board member's objectivity is obviously compromised and this would affect any effort towards a fair resolution due to possible bias.
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> 4. Having a Board member step in to resolve disputes really puts them into "the eye of the storm" and conceivably this could place their and their family's safety, security and well-being in jeopardy from possible repercussions from the dispute at issue.
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> 5. If neighbors are unable to resolve disputes between themselves then the proper recourse would be for them to turn to the legal system or retain professional mediation services at their individual expense.

Mr. Dolnick writes, at Exhibit p. 29:

> Why should the association, who is not a party to the dispute, mediate between a member to member dispute? The association could become a party to a lawsuit if one of the parties to the dispute takes issue with how the board member mediates the process. Or one of the members to the dispute could claim that the board member favored the other party, etc., etc. The association is charged with maintenance, improvements and control of the common area. The law should not force the volunteer board members to solve or be a part of any dispute between members unless and only unless the issue involves the common area.

Mr. Jenkins writes to express concern about the personal risk involved in inserting oneself into the disputes of others and indicates that he would resign as a board member rather than perform such a duty. See Exhibit p. 34. ECHO also opposes board involvement in neighbor to neighbor disputes, for reasons similar to those outlined above. See Exhibit p. 40.

These are reasonable objections. Requiring that board members serve some sort of mediator role in disputes between neighbors would impose a new duty that, in a large association, could consume significant amounts of time. Petty, animosity-driven neighbor disputes that would not justify the cost of litigation might well clutter the docket of a no-cost, board-refereed process.

Nor is there any reason to think that a board member will have the necessary skills to resolve disputes between neighbors. Board member errors or perceived bias in dispute resolution may make matters worse, or generate new disputes between the board and a disappointed party.

We have heard frequent testimony on the difficulty of finding homeowners willing to donate their time to serve on the board. Adding significant new

responsibilities, especially responsibilities that prospective board members may find risky or unpleasant, may further deter service on boards.

The staff recommends that the internal dispute resolution process be limited in its application to disputes between the association and a member. This could be done by making the following changes to the proposed law:

§ 1363.810. Scope of article

1363.810. (a) This article applies to a dispute between an association and a member~~, or between members of an association~~, involving their rights, duties, or liabilities under this title, under the Nonprofit Mutual Benefit Corporation Law, or under the governing documents of the common interest development or association.

(b) This article supplements, and does not replace, Article 2 (commencing with Section 1369.510) of Chapter 7, relating to alternative dispute resolution as a prerequisite to an enforcement action.

§ 1363.830. Minimum requirements of association procedure

1363.830. A fair, reasonable, and expeditious dispute resolution procedure shall at a minimum satisfy all of the following requirements:

(a) The procedure may be invoked by ~~any~~ either party to the dispute~~, including an association~~.

(b) If the procedure is invoked by a member ~~in a dispute with the association~~, the association shall participate in, and is bound by any resolution of the dispute pursuant to, the procedure.

(c) If the procedure is invoked ~~by a member in a dispute with another member, or~~ by the association ~~in a dispute with a member~~, the member may elect not to participate in the procedure. If the member participates but the dispute is resolved other than by agreement of the member, the member shall have a right of appeal to the board of directors of the association.

(d) An agreement reached pursuant to the procedure binds the parties and is judicially enforceable.

(e) The procedure shall be provided by the association without cost to the participants.

§ 1363.840. Default meet and confer procedure

1363.840. (a) This section applies in an association that does not otherwise provide a fair, reasonable, and expeditious dispute resolution procedure. The procedure provided in this section is fair, reasonable, and expeditious, within the meaning of this article, subject to good faith implementation by an association.

(b) ~~Any~~ Either party to a dispute may invoke the following procedure:

(1) The party may request ~~another~~ the other party to meet and confer in an effort to resolve the dispute. The request may be oral or written, by whatever means appears to the party appropriate to communicate the request.

(2) A member of an association may refuse a request to meet and confer. The association may not refuse a request to meet and confer.

(3) ~~If the association is a party to the dispute, the~~ The board of directors shall designate a member of the board to meet and confer. ~~If the association is not a party to the dispute, but the parties request participation of the association, the board of directors shall designate a member of the board to participate.~~

(4) The parties shall meet promptly at a mutually convenient time and place, explain their positions to each other, and confer in an effort to resolve the dispute. ~~If the association is not a party but participates on request of the parties, the board designee shall seek to facilitate resolution of the dispute.~~

(5) A resolution of the dispute agreed to by the parties shall be memorialized in writing and signed by the parties, including ~~any~~ the board designee on behalf of the association. An agreement that is not in conflict with law or the governing documents of the common interest development or association binds the parties and is judicially enforceable.

Delegated Decisionmaking Authority

Under the default internal dispute resolution procedure, "the board of directors shall designate a member of the board to meet and confer." Proposed Section 1363.840(b)(3). ECHO objects to requiring that a single member of the board have authority to bind the association as a whole:

> The proposal that boards be required by law to delegate their authority to a single individual to decide every community dispute is insupportable. We know of no legal authority for this concept and believe it is antithetical to both corporate and real property law. We fear it is dangerously unschooled for the Commission to believe that vesting the authority to resolve all disputes in a community association in a single person would not seriously endanger both the corporation and the property rights of every owner in the development.
>
> […] This ignores the principles of precedent that apply to communities of whatever size, the unknowable liability inherent in endowing any single agent with binding authority over what might be either a corporate or property interest (or even both), and the

> undeniable and harmful impact on the ability of associations to adequately manage and insure against risk.

See Exhibit pp. 40-41.

One answer to ECHO's concern is that proposed Section 1363.840(b)(5) provides that a negotiated agreement has binding effect only if it is "not in conflict with law or the governing documents of the common interest development or association…." This provides protection against many of the harms that ECHO anticipates. A disadvantage of this approach is that it ultimately depends on a legal determination of the consistency of the negotiated agreement with law and the governing documents. This might lead to significant frustration if a homeowner relies on an agreement that is subsequently nullified through litigation.

ECHO's concern also assumes that the risk of erroneous decisionmaking is higher when a decision is made by a single member of the board than when a decision is made by the board as a whole. That assumption has merit. Decisionmaking is often more effective when more minds are brought to bear on a problem.

On the other hand, existing corporations law authorizes the creation of committees of as few as two board members that can directly wield board authority (with certain express exceptions relating to major corporate decisions). Corp. Code § 7212. As one authority on CID law notes: "In community associations, important functions such as architectural control and the conduct of disciplinary and enforcement proceedings are often delegated to member committees." C. Sproul & K. Rosenberry, Advising California Common Interest Communities, § 2.122, at 138 (Cal. Cont. Ed. Bar, 2003). Thus it appears that delegation of board authority to a small subset of the board is nothing extraordinary. Note also that a recent amendment of the Davis-Stirling Act authorizes a board to appoint a committee of one to negotiate a payment plan on an overdue assessment. Section 1367.1(c)(2). Whether vesting authority in a committee of one is wise is another question.

If the Commission shares ECHO's concern about vesting binding authority to resolve disputes in a single individual, there are at least two alternatives worth considering:

(1) *Increase the number of representatives.* This could be done by requiring that the board appoint a committee, pursuant to Corporations Code Section 7212, to

meet and confer. Under that Section, the board could set the committee at whatever size it finds appropriate (with a minimum of two members). The committee would exercise the same authority as the board (subject to the express statutory limitations, which shouldn't be relevant in most homeowner disputes).

(2) *Require board ratification.* The proposed law could retain the single representative, but remove that person's authority to reach a binding agreement. The representative would recommend an agreement to the board, which would then ratify or reject the agreement. This approach has advantages and disadvantages. Negotiations involving only a single representative would probably be more relaxed and informal than a meeting with a committee, and therefore perhaps more productive. On the other hand, a homeowner may be justifiably skeptical of negotiating with a person who lacks decisionmaking authority, especially if a particular board has a track record of rejecting negotiated agreements. Perhaps the reliability of the process could be enhanced by giving the representative's recommendation some presumption of correctness. For example, the proposed law could require that the board ratify the representative's recommendation unless the board determines that the recommendation would conflict with law or the governing documents. In theory, that would give the representative authority on matters of discretion, while providing a means of setting aside agreements that violate the law or the governing documents.

The first alternative has the advantage of simplicity — no subsequent board action would be required. The second alternative has the advantage of informality. The appeal of a "meet and confer" approach is that it can take a dispute outside the context of adversarial formality. In a less formal setting, the parties may be able to speak plainly about the dispute and perhaps reach some mutually acceptable compromise. A meeting with a committee may seem just as threateningly adversarial as a meeting with the board as a whole. In order to preserve the informal character of the meet and confer process, **the staff recommends the second alternative approach — board ratification of an agreement reached by a single representative.** The staff invites public comment on the merits of that approach.

Relation to Existing Meet and Confer Procedure for Disputed Assessments

In 2002, Assembly Bill 2289 (Kehoe) added Section 1367.1 to govern collection of overdue assessments. Subdivision (c) of that section provides a procedure for resolution of a disputed assessment or negotiation of a payment plan:

> (c)(1) An owner may dispute the debt noticed pursuant to subdivision (a) by submitting to the board a written explanation of the reasons for his or her dispute. The board shall respond in writing to the owner within 15 days of the date of the postmark of the explanation, if the explanation is mailed within 15 days of the postmark of the notice.
>
> (2) An owner, other than an owner of any interest that is described in Section 11003.5 of the Business and Professions Code, may submit a written request to meet with the board to discuss a payment plan for the debt noticed pursuant to subdivision (a). The association shall provide the owners the standards for payment plans, if any exist. The board shall meet with the owner in executive session within 45 days of the postmark of the request, if the request is mailed within 15 days of the date of the postmark of the notice, unless there is no regularly scheduled board meeting within that period, in which case the board may designate a committee of one or more members to meet with the owner.

The procedure in Section 1367.1(c) and the proposed internal dispute resolution provisions are somewhat duplicative, in that each provides a mechanism for internal discussions between the board and the homeowner, without the involvement of a neutral. This could lead to confusion. For example, if a homeowner were to request a meeting to discuss a payment plan, it wouldn't be clear whether the member was acting under Section 1367.1(c) or under the default meet and confer procedure in proposed Section 1368.840.

It would probably be helpful to clarify the relationship between the two procedures. Because Section 1367.1(c) was enacted so recently and has clearly been tailored to the types of disputes it is intended to address, **the staff recommends that we defer to that provision.** Subdivision (c) could be added to Section 1363.810, as follows:

> (c) This article does not apply to a dispute that is subject to subdivision (c) of Section 1367.1.

This would preserve Section 1367.1(c) unchanged and eliminate any ambiguity about which procedure is being used in a particular case.

Optional Nature of Procedure

The proposed law requires that an association provide a dispute resolution procedure that is fair and reasonable, and that satisfies the following criteria: (1) use of the procedure is optional for a homeowner, but the association board is required to participate if a homeowner invokes the procedure, (2) if the dispute is resolved other than by agreement of the member, the member may appeal the decision to the board, (3) any agreement reached is binding on the parties and judicially enforceable, and (4) the procedure shall be provided at no cost to the participants. See proposed Section 1363.830.

The statute then provides a model procedure, that expressly satisfies the statutory requirements. The procedure is optional, in the sense that an association may choose to follow some other procedure that satisfies the statutory criteria. However, the procedure also serves as a default, which applies if an association does not otherwise provide a procedure as required by the statute.

In the past, we have received comments expressing a preference for mandatory procedures. We have not received any comments specifically objecting to the optional aspect of the dispute resolution procedure. This may be because the procedure would apply as a default if an association does not provide its own procedure. This ensures that some dispute resolution procedure will be available regardless of whether an association has acted to adopt its own procedure.

Before making a final recommendation on the proposed dispute resolution procedure, it would be helpful if those interested in the proposed law could comment specifically on whether they are comfortable with the optional/default approach taken here.

Form of Request

Proposed Section 1363.840(b)(1) provides that a request to meet and confer "may be oral or written, by whatever means appears to the party appropriate to communicate the request." Mr. Dolnick writes, at Exhibit p. 28:

> The request should be in written form only. Too much controversy can result from an oral request. The request can be made to any board member, outside of an official board meeting. The board member may ignore the statement, thinking that the resident is just talking, and then the difference of opinion occurs. If

> the Commission thinks that an oral request is absolutely necessary, then the request should be made to the board of directors when a quorum is present. It is best to create a paper trail because one never knows when a dispute will end up in court.

It does seem that oral requests for dispute resolution could lead to misunderstandings or game playing. Requiring that requests be in writing would not entirely cure that problem, but it would help. It would be a simple matter to revise the proposed law to require a written request. **The staff is inclined to do so.**

Cost of Procedure

The proposed law requires that the internal dispute resolution process be "provided by the association without cost to the participants." Proposed Section 1363.830(e). Ms. Vanitzian suggests that any association procedure will necessarily impose costs. She writes, at Exhibit p. 5:

> Since when has anything associated with deed-restrictions been cost free, let alone informal? I hardly consider a letter from an association attorney "informal" and "cost free" in any sense of the words. I'll send you ten years worth of cost free affordable community living receipts caused by board and attorney machinations, and you tell me if this meets your definition.

The purpose of Section 1363.830(e) is to ensure that an association cannot charge individual members a fee for participation in the internal dispute resolution process. Ms. Vanitzian's comment seems to raise a different issue, the overall cost to the association of establishing and running such a procedure. That is an important concern and we should attempt to avoid increasing operating costs where possible.

The internal dispute resolution procedure shouldn't increase association operating costs. It is very informal and would only involve the homeowner disputant and a single member of the association board. If anything, the existence of an informal internal procedure should reduce costs, as it will provide an opportunity for disputants to determine whether there is a basis for informal resolution of the dispute before incurring any legal costs.

In order to avoid any confusion between the cost to participate in the process and any cost to the association as a whole incurred in providing the process, Section 1363.830(e) could be revised as follows:

(e) ~~The procedure shall be provided by the association without cost to the participants.~~ A member of the association shall not be charged any fee to participate in the process.

The staff recommends that this change be made.

DISPUTE RESOLUTION INFORMATION CENTER

A significant impediment to dispute resolution in the common interest development setting is the simple fact that associations and their residents may not know where to turn for help in resolving a dispute. Neighborhood dispute resolution resources may be readily available, for example, but the parties may be unaware of their existence or how to access them.

The proposed law would create a dispute resolution information center that people could turn to for information about common interest development dispute resolution. A statewide information center, accessible by a toll-free number or on the world wide web could be inexpensively maintained and would be cost effective in assisting common interest development residents in resolving disputes without having to resort to litigation. Besides information about local mediation programs and other dispute resolution resources, the information center could provide basic information about the Davis-Stirling Common Interest Development Act and other governing laws. This should reduce litigation because in many instances a dispute results from a simple lack of understanding about basic rights and responsibilities under the law.

There are a number of state agencies that might be appropriate to maintain a dispute resolution information center. For example, the Department of Justice has existing enforcement authority under the Nonprofit Mutual Benefit Corporation Law. The Department of Consumer Affairs administers the Dispute Resolution Programs Act, and maintains public information channels about local dispute resolution programs. The Department of Real Estate regulates development of common interest developments. The Administrative Office of the Courts coordinates with court clerk's offices in each county and would be in a position to help disseminate dispute resolution information to potential litigants. Beginning January 1, 2003, the Secretary of State has responsibility to register every California CID biennially and must make the registration data available as public information.

Of these entities, the Commission recommended that the Secretary of State be assigned responsibility to maintain the CID dispute resolution information center. The Secretary of State will have ongoing contact with every association in the state, and will be a repository of information about common interest developments that interested persons are likely to contact. Moreover, the Secretary of State has available a funding mechanism to maintain the information center — the CID registration fee.

Comments

Ms. Vanitzian expresses skepticism about the benefit of the proposed information center. Based on her experience with other state agencies, she predicts that the bureaucracy involved in state provision of the service would render it unworkable. See Exhibit p. 6. The staff disagrees. There are existing examples of state information centers that provide useful information effectively and at no cost to the person inquiring. For example, the Office of Privacy Protection maintains a well-designed website providing a range of information on privacy issues. See <www.privacyprotection.ca.gov>. That office also maintains a toll-free number for telephone inquiries.

Commentators also raised issues concerning the proper agency to maintain the information center and about possible sources of funding. Those issues are discussed below.

Secretary of State as Responsible Agency

The proposed law would assign responsibility for maintenance of the information center to the Secretary of State. The Secretary of State's office has concerns about that approach. Mr. Carrel writes, at Exhibit p. 37:

> I have several concerns about this proposal. First, the Secretary of State's office is a filing office with no knowledge or expertise concerning the needs and requirements of common interest development associations (CIDs) and their members. And, our filing experience with CIDs is only three months old since it is the result of the implementation of AB 643 (Chapter 1117, Statutes of 2002) requiring CIDs to file with our office. This law only went into effect on January 1, 2003.
>
> Secondly, your proposal requires the Secretary of State to serve as a clearinghouse for common interest development information. If this occurs, people telephoning for information are going to expect that staff will be available to answer any questions they may have about these issues.

> This means that there will be a need for designated staff to undergo initial and ongoing training to obtain and refine a base of knowledge on this issue so that they can provide information to the public. As a result this will require initial start up costs and ongoing costs for staff to field these calls, initial and ongoing training, communications technology, and the cost of the phone calls if there is a toll-free line.

There are two factors that seem most relevant in determining which agency should have responsibility to maintain the information center:

(1) *The likelihood that homeowners would look to that agency for assistance in a CID dispute*. If the location of the information center is consistent with homeowners' expectations, the service is more likely to be found and used.

(2) *The ease with which the agency could integrate the new responsibility into its present operations.* The information center would probably be less costly and more effective if implemented by an agency that already has related experience.

Based on these factors, the Secretary of State's office does not appear to be a strong candidate. Its sole connection to CIDs is its role in registering CIDs. This is a new function that may still be unknown to many association boards and is probably unfamiliar to most CID homeowners. It seems unlikely that a homeowner would look to the Secretary of State for help with a CID dispute.

While the Secretary of State clearly has experience in providing complex information on its well-organized website, it has no experience in dealing with consumer complaints, alternative dispute resolution, or CID law generally. In order to determine what information might be helpful to homeowners, the Secretary of State would need to develop new staff expertise in a completely unfamiliar area.

The strongest point in favor of assigning the information center to the Secretary of State's office is the availability of an existing funding mechanism — the CID registration fee. Section 1363.6 authorizes the Secretary of State to collect a fee of up to $30 for registration of a CID. Proposed Section 1363.7(d) provides that the "Secretary of State shall fund the cost of maintaining the common interest information center from the filing fee provided for in Section 1363.6." The staff had assumed that $30 per CID would be more than adequate to cover the cost of registration and that a small amount could be added to the fee

administratively to fund the information center, without exceeding the statutory limit.

However, the Secretary of State has set the CID registration fee at the statutory maximum of $30 per CID. This means that the fee cannot be raised administratively to cover the cost of the information center. The cost of the center must either be absorbed within the agency's existing budget or an additional funding source must be provided by statute. This eliminates any fiscal rationale for placing the information center in the Secretary of State's office.

In light of this analysis, and the Secretary of State's general reluctance to undertake the responsibility, the staff is inclined to assign the information center responsibilities to another agency.

Other Candidates

Other candidate agencies include the Department of Consumer Affairs, the Department of Housing and Community Development, the Department of Real Estate, the Department of Corporations, and the Department of Justice (through the Department's Public Inquiries Unit).

In terms of the likelihood that homeowners would naturally turn to these agencies for assistance with a CID dispute, there doesn't seem to be any clear front runner. However, it may be somewhat less likely that homeowners would look to the Department of Corporations for help. While most CIDs are corporations, and many governance issues turn on points of corporations law, that probably isn't as obvious to homeowners as the connection to consumer complaints, housing, real estate, or law enforcement.

In terms of existing expertise, there still is no obvious front runner. The Congress of California Seniors urges that we select the Department of Consumer Affairs, writing at Exhibit p. 23:

> The infrastructure for disseminating information to the public about ADR is already in place at Consumer Affairs through its Consumer Relations and Outreach Division, through its Dispute Resolution Office, and through the courts. It is not apparent to us that the Secretary of State's office has a comparable infrastructure in place.
>
> …
>
> The mission of Consumer Affairs — consumer rights and responsibilities, consumer education, and consumer protection — are all consistent with the goals that CLRC is trying to reach in recommending ADR for homeowner associations.

Ms. Calderon concurs. See Exhibit p. 26.

It is true that the Department of Consumer Affairs has considerable expertise in dealing with consumer issues and already provides information about local dispute resolution resources. On the other hand, the Department has so many different specialized responsibilities that its website is somewhat difficult to navigate. Individual program sections (such as the Office of Privacy Protection pages) are well designed, but it isn't always easy to find your way to them. The staff is somewhat concerned that a CID information center could become lost in the shuffle at the department's busy site.

The Department of Justice also has existing expertise in dealing with consumer complaints and has existing oversight authority with respect to certain aspects of corporate governance. The Department also has considerable legal resources and might find it fairly easy to collect and present relevant statutory and regulatory information. The staff found its website fairly easy to use.

The Department of Real Estate has existing expertise in CID law, with responsibility for developing regulations that form the foundation of most CIDs' governing documents. This substantive knowledge could be very helpful in determining what information to provide and how best to present it. The Department's website is easy to use, and already includes a page dedicated to the provision of information about real estate law, which can be found from a direct link on the Department's home page. One possible concern about the Department of Real Estate is that some homeowners may see the Department as being more sympathetic to developers than to consumers. Persons with that perspective would probably prefer that the information center be maintained by the Department of Consumer Affairs.

The mission of the Department of Housing and Community Development seems primarily focused on the construction and availability of housing. The Department undoubtedly has expertise in CID concepts, but may not have much experience with the problems associated with CID governance and operation. The Department's website is easy to use.

The Department of Corporations undoubtedly has considerable expertise with corporations law and problems arising in corporate governance. This could be useful in providing relevant information from the Corporations Code. The Department's website is easy to use.

Although there is no obvious choice, some agencies do seem to be better suited to providing the information center than others. **The staff believes that any of the following agencies would be a good choice:** the Department of Justice (for its existing enforcement authority and legal expertise), the Department of Real Estate (for its considerable knowledge of CID law and experience in providing access to real estate law on its website), and the Department of Consumer Affairs (for its general consumer orientation and familiarity with local dispute resolution resources). The staff will be contacting these agencies to inquire about their willingness to maintain the information center.

Funding

The cost of the information center will need to be absorbed in the responsible agency's existing budget, or a statutory funding source will need to be established.

One way to fund the center would be to raise the ceiling on the CID registration fee and earmark the increase specifically for funding of the information center. It has been estimated that there are more than 30,000 CIDs in California. If $2 were added to the registration fee, that would generate $30,000 per year (the filing is biennial). That should be more than sufficient to pay for necessary changes to an existing website and maintenance of an automated telephone information system.

Undoubtedly, many CID homeowners would be willing to pay a small amount to fund the proposed information center. See, e.g., comments of Congress of California Seniors, at Exhibit p. 24:

> we propose … that CID corporate registration fees be used to expand/strengthen the existing Dispute Resolution Office in the Department of Consumer Affairs.
>
> In addition, we urge the Commission to revisit its own suggestion that ADR programs could be financed through a $1 or so "per unit" annual tax on each of California's 3.5 million CID homes.

On the other hand, there are likely many other homeowners who would not welcome another fee increase, however small. For example, Mr. Dolnick writes, at Exhibit p. 28.

> [This] is another instance where the association is required to assume the burden of increasing their assessments in order to pay for extra money necessary to abide by the Commission's recommendations.
>
> …
>
> Whenever the law mandates that the associations have to pay a fee, should an assessment increase be necessary to pay the fee, these mandated fees should be excluded from the 20% the association may raise the fees without a vote of the membership. These state-mandated fees are not part of the association's maintenance and upkeep responsibilities. The board should not have to be vilified by the membership when state mandatory fees are imposed.

Ms. Vanitzian writes, at Exhibit p. 12:

> Homeowners are sick and tired of the rising costs, assessments, mandatory rules and regulations resulting in fines, penalties, interest, and costs they cannot verify and can no longer afford. It is easy to be in the position of a governmental agency where a paycheck is received every week, and sit back and legislate those who are unemployed, or on fixed incomes, or in poor health and in need of every cent to stay alive.

The Commission should be mindful of the difficulties that increased costs might present to persons on a fixed income.

Another possible source of funding is subdivision application fees paid by developers to the Department of Real Estate. Existing law provides for fees to be paid to the Department on filing various subdivision-related applications. See Bus. & Prof. Code § 11011. That section establishes caps on the fee amounts and directs the Department to periodically set lower fees by regulation if the lower fees are "sufficient to offset the costs and expenses incurred in the administration of this chapter." At present, many of the fees are set lower than the statutory caps. See 10 Cal. Code Regs. § 2790.1. If the information center were assigned to the Department of Real Estate, the cost could perhaps be absorbed from the subdivision filing fee revenue. Those fees can be raised administratively, if necessary.

Another option would be to provide no funding and require that the responsible agency maintain the information center out of its existing budget. The cost of collecting and posting information on the Internet is small, especially for an agency that already maintains a sophisticated website (as all of the candidate agencies do). The most significant cost may be that associated with

setting up and maintaining a toll-free automated telephone information system. If that cost is considered prohibitive, the proposal could perhaps be scaled back to provide for Internet publication only. That would still be an improvement.

Regarding the phone system, it should be noted that some commentators seem to misconstrue the purpose of the automated telephone system. As envisioned, it would only provide a means of obtaining the same information that is provided on the website, perhaps by providing referrals to other agencies (such as the Department of Consumer Affairs' dispute resolution program, or local law libraries) or by taking orders for mailed documents. It was not intended as an advice line, where callers could describe their specific problems in order to receive information or advice tailored to their circumstances. The cost of the former is slight, while the cost of the latter would be considerable.

Of course, a third alternative would be to delete the information center proposal from the proposed law. This may not be the time to propose any expansion of government services, however small.

Conclusion

The staff recommends that the information center be included in the Commission's final recommendation and that it be assigned to an agency other than the Secretary of State. The cost of the center would be very small and the benefits to homeowners should easily justify the cost. The cost is probably absorbable by whatever agency takes on the responsibility, but the proposed law could be revised to increase the statutory registration fee to provide additional funding. Fee-based funding might be advisable considering the State's current fiscal crisis.

WHAT NEXT?

If the Commission decides to make only a small number of changes to the proposed law, it could approve the tentative recommendation, with changes, as its final recommendation. Another approach would be for staff to prepare a draft recommendation for consideration at the next meeting. That would provide another opportunity for public comment on the revised proposal. In this very contentious policy area, more opportunity for public input is definitely desirable.

On the other hand, delaying approval of the final recommendation could create problems in introducing implementing legislation in 2004. To do so, the

Commission would need to meet and approve its final recommendation before the end of this year. Under current assumptions about the future meeting schedule, that would probably not be a problem.

One final note: for logistical reasons, the staff is considering whether any final recommendation should be divided into two or more smaller recommendations. In some ways, smaller recommendations may be easier to manage in the Legislature than a single package.

Respectfully submitted,

Brian Hebert
Assistant Executive Secretary

Dear Mr. Sterling:

I am writing in response to the email you received from Carole. I am in complete agreement with what she had to say. I live in Monarch Park, a homeowners' association. My husband and I went to mediation in l995, and several of the issues mediated then have yet to be followed by our Board and Management. At the present time we are in litigation because we believe that the Board is not allowing us to see books and records of the Association that we are legally entitled to see. We also believe that the Board passed what it calls a "Resolution", but it is really an admendment to our CC&Rs. This was done without consulting the membership. Hence, what believe is really an Admendment was never registered with the County. The Board would only go to binding arbitration, and we refused to agree to that because we had seen how the "powers that be" responded to the mediation which cost us a few hundred dollars. Now, before we can get into court, we must go to non-binding arbitration, another waste of our time and money. All of this has been going on since the end of l994, and we have spent thousands of dollars trying to get justice. We definitely need government oversight of CIDs because without that Boards and Managers have all the power to inflict whatever they wish upon homeowners.

Also, I would very much like a clear definition of what qualifications must be met before one can be a member of an Association. In Monarch Park we have a Board Member who doesn't even own a home in our community. He, his wife, and child live with his wife's parents. As a Board Member he is privy to all books and records of the Association, while my husband and I as homeowners are being denied this access. The excuse that is used is that one can be a Board Member because our CC&Rs don't state that one must own a home in order to be on the Board. Obviously I would like the final version of the revision of the Davis-Stirling Act to state clearly that in order to be considered a member of an association a person must own property in his/her respective association and must be paying the Association dues.

Memorandum 2002-55 states, on page 3 states that "time is too short for a careful review of the matter (what is a member) if we intend to introduce legislation in the coming year. Defining what makes an individual a member of an association should not be that time consuming. In fact there is a good definition on pages I and 2.

Charlene Henley
5275 Country Oak Court
San Jose, CA 95l36
(408) 226-03l2

Donie Vanitzian
Arbitrator

January 14, 2003

Mr. Nathaniel Sterling
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

Dear Mr. Sterling,

I have finally reached a point where silence to the California Law Revision Commission's (CLRC) preposterous Recommendations no longer serves a useful purpose. Therefore on behalf of all those homeowners who have no idea that the CLRC works behind the scenes to influence legislation, I must respond.

THE TEMPLE OF BLAME:
STRETCHING BROKEN BAND AIDS
INTO THE ALTERNATIVE DISPUTE RESOLUTION OBLIVION

CONTENTS

TEMPLE OF BLAME

Generally

The overworked and flogged-to-death arguments regarding diversion of the growing number of what the CLRC labels "**minor**" disputes involving common interest developments out of congested courts is just that: over-inflated.[1] Interesting is your use of the word "minor." Minor to you perhaps because you don't live in a common interest development plagued by CLRC recommendations to a legislature that refuses to listen to its own constituents but opens arms and doors to recommendations from industry-influenced entities.

Alternative Dispute Resolution was meant to be a **voluntary alternative** to rigorous courts, rules, attorneys and rising fees. With over 300,000 unemployed in California today, employment in the courts might not be a bad thing. Denying even **ONE** homeowner his/her right to bring suit in a court of American law because of the imposition of **mandatory** Alternative Dispute Resolution, in my opinion is unconstitutional.

Dumbing Down Litigation: Forcing More Laws Down The Throats of CID Homeowners

Foreseeably, its only reason for adding another section to the Civil Code is to placate the industry in preventing precedent-setting rulings in a court of law against homeowner associations and the industries that feed off of them and millions of unsuspecting homeowners. Forcing arbitration on homeowners intentionally benefits industry and associations by preventing more than one homeowner from filing suits together for similar claims. It unfairly controls the types of problems that exist and do not exist. Homeowners will be forced to fit their problems into pre-designed problem-categories in order to fulfill nexus requirements so they can file claims or requests for assistance.

As I have written to the CLRC in the past, neither arbitration nor mediation tolls the statute or stays the action. Homeowners have complained in record numbers of spending thousands of dollars in arbitration and mediation only to end up in litigation. Worse, the homeowner was **forced** to present their case (inclusive of documentation, i.e., ***evidence***) only to have the board contrive evidence (minutes and other gap-filling documentation) to counter the homeowner's evidence produced in arbitration/mediation prior to litigation.[2] There is nothing in the CLRC's recommendation that prevents this from happening. **Making arbitration mandatory will exacerbate this explosive problem.**

The Ineffectiveness of Civil Code Section 1354 (g-h)

Whether arbitration, mediation, or a court of law; because of the nature of the homeowner-association-beast, intentionally, through a variety of options available to them, boards prolong and complicate homeowner problems to prevent them from taking action -- that is, **any action**. Of the thousands of letters we receive, one of the most common discussions is that of Breach of Confidentiality of ADR communications, settlements and negotiations. It matters not what the law states regarding such communications -- they are constantly breached with devastating results. Civil Code Section 1354(g-h) has proved **utterly useless** to common interest development homeowners across California whose boards and management companies privy to the ADR hearings and negotiations, breached the law. Of the communications and documents we receive, nearly one hundred percent of the time such consequences of breach affect only the homeowner. And the consequences are steep.

There Is No Such Thing as "Good Faith"

Read carefully, the premise of the CLRC's December 2002 Tentative Recommendations

[1] California Law Revision Commission, *Tentative Recommendation*, December 2002, page 2.

[2] Vanitzian & Glassman, *Vitto Appelling! Destroying the Myth of Affordable Community Living*, (2002).

are hypothetically based on, *good faith* ~ again devoid penalties for wrongdoing. It banks on the fact that both parties are acting in good faith. After decades of relying on such nebulous terms-of-art, *good faith* in the context of homeowner associations and boards (with a vested interest in their ***own*** positions on that board), has disintegrated into a cloud of smoke and mirrors - that is, if it ever existed at all.

The Good Faith Corporate Model

In my opinion the words "good faith" should be expunged from the Davis-Stirling Act and association case law as it relates to homeowner associations and their boards, because it doesn't exist. Good faith is a corporate model melted into a residential homeowner association ill-fitting mold. Without a *per se* definition of good faith for homeowner association boards to follow to the letter, the term is meaningless. In numerous California courtrooms well-rehearsed stone-faced board members without a modicum of shame, espouse Good Faith **under oath** as if it were part of the Ten Commandments. Reality belies the testimony.[3]

"Experience Suggests . . ."

Interestingly enough, the CLRC uses the term "experience suggests" throughout the recommendation. Just whose experience might that be? It certainly cannot be the experience noted in the thousands of letters we receive from readers to our *Associations* column appearing in the Los Angeles Times Sunday Real Estate section. These homeowner experiences most certainly differ from the conclusions the CLRC bases its reports on. The real life experiences detailing financial and personal ruin, losses, frustrations, damages and distress inflicted by good faith boards, courts, legislatures, and I dare say, recommendations by the CLRC, materially differ from your purported findings.

Recommendations (tentative and otherwise) made by the CLRC give the appearance that it is not concerned about the homeowner's economic situation, or economic considerations in general, but rather more interested in pigeonholing homeowners into a category that can be legislated separate and apart from real (i.e., legitimate real property) homeowners. The problem you ask? Is the following:

Summary of CLRC's Tentative Recommendations[4]

My comments are noted below with regard to the CLRC's Summary of Tentative Recommendations and its proposals for supposed improvements to California's dispute resolution process for common interest developments.

(1) The existing mandatory ADR requirement as a prerequisite to litigation should be preserved and improvements made to various weaknesses in the process.

Comment:

The aforementioned comment is equivalent to a "do not pass go, do not collect $200, go straight to jail" mentality. The CLRC has categorized problems into 5 areas.[5] *Only heaven knows HOW you came up with the list you chose.*

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[3] Glassman & Vanitzian, *Board Actions Don't Show Good Faith*, Los Angeles Times, March 3, 2002.

[4] California Law Revision Commission, *Tentative Recommendation*, December 2002, page 1.

[5] California Law Revision Commission, *Tentative Recommendation*, December 2002, page 2.

Experience suggests that disputes typically fall into one of several categories: (1) Financial disputes (maintenance, common charges, special assessments, fines and penalties, restrictions on resale or

TEMPLE OF BLAME

Owing to space limitations, I have intentionally omitted referencing one of the biggest and longest running complaints from homeowners, which entails interference by third parties such as management companies and vendors.

Why did the CLRC limit itself to five problem areas? The California courts don't say, "Here are five problem areas that citizens can address and nothing more can come into this court!" It's ludicrous. You can no more limit the problem areas surrounding homeowner associations, than you can control the demographics of those who purchase into the mandatory membership requirements of a homeowner association. ***The problems are far greater than the five areas you list, and the ramifications of the problems are grave with serious consequences.***[6]

Ironically, the problem areas noted by the CLRC can be addressed by the entities that would handle such problems outside of a common interest development such as, Building & Safety, Dept. of Health, Securities and Exchange Commission, Animal Regulation, Dept. of Real Estate, local Police Departments, and so on. The arbitration and mediation process you recommend should altogether be eliminated. It is a financial black hole to homeowners, and drain on the homeowners' time and money and it is ineffective.

(2) Every association should be required to offer its residents a simple, informal, and cost-free way to have their concerns heard and addressed.

Comment:

Today, the stakes of living in a common interest development with deed-restrictions and homeowner association boards of directors, are so high, that without a legal definition for the terms "informal," "heard and addressed," such indications can have serious legal ramifications for both sides. Since when has anything associated with deed-restrictions been cost free, let alone informal? I hardly consider a letter from an association attorney "informal" and "cost free" in any sense of the words. I'll send you ten years worth of cost free affordable community living receipts caused by board and attorney machinations, and you tell me if this meets your definition.

Offering residents a way to be heard is meaningless because California precedent is clear in that courts defer to board decisions.[7] *Also, what an association* ***should do*** *and what they* ***do*** *are two different things. As of today, there are no Association Board Police Patrols willing to force boards to comply with the law.*

There are a lot of things associations should do, and are mandated to do, but don't bother to do. The reason? The CLRC and the state legislature haven't uncovered the big mystery. The mystery? There is ***lack of penalties for boards that break the law*** *in the Davis-Stirling Act. The CLRC fails to address this, and the CLRC hasn't remedied this* ***before*** *taking the unprecedented steps of recommending legislation to* ***mandate*** *various and sundry laws on already stressed homeowners, it is beyond comprehension.*

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transfer, access to books and records). (2) Architectural controls (repairs, alterations, painting, decor, landscaping). (3) Pet issues (barking dogs, wandering cats, animal waste). (4) Use of private space (leasing/subleasing, commercial or professional use). (5) Personal interactions (facilities use, parking, noise, rudeness).

[6] Vanitzian & Glassman, *Title Appalling! Destroying the Myth of Affordable Community Living, (2002).*

[7] *Lambden, Nahrstedt,* and more.

(3) A statewide dispute resolution information center should be established that is readily accessible by associations and their residents, to provide information about the governing law and about the availability of local dispute resolution mechanisms.

Comment:

Kidding aside, the information center you propose should be manned by attorneys and psychiatrists.

a) If the common interest development laws are so cumbersome and confusing, what on earth leads the CLRC to believe that an information booth handing out directions will make one bit of difference ~ especially when there is not one agency willing to take responsibility for the disaster. Even the Department of Insurance will not assist homeowners in obtaining an ***entire*** *(emphasis on ENTIRE) unabridged copy of their homeowner association's insurance policy. When I asked my board for assurances that the copies they were "selectively" giving me were complete, they wrote me "we have no knowledge of whether they are the complete and total policies covering Villa HOA, other than what has been represented to us by the insurance broker."*

When I phoned the insurance agent-broker and requested a full and complete original of the insurance policy I was told "there is only one full and complete copy of the association's policy in the ***whole wide world****, and we don't know where that is." I was sent to the management company who sent me to the board who sent me back to the management company AND the broker. To this day I still cannot obtain a verifiable unabridged copy of my association's insurance policies that I* ***am forced by law to pay for.*** *What do I do sue? Arbitrate? Mediate? I have requested arbitration and mediation at every homeowner association meeting and in writing to each successive board. Each board has* ***ignored*** ***all requests for either, and no mention of either exists in the minutes.*** *Does the CLRC have any idea where your so-called information booth-center experts would direct me, and how would they force the board to comply?*

b) Who will fund such a center? The homeowners? The taxpayers? State subsidies? With all due respect to the CLRC, this dispute resolution information center is ridiculous and it will ***never*** *work. Presently there are unprecedented budget cuts across the state, and agencies are unwilling to recognize homeowners in common interest developments. How many forms will homeowners be forced to complete before receiving useful information or assistance? How many hours on "hold" waiting for assistance will homeowners be forced to endure before they are transferred to another department?*

c) An example is the California's Department of Insurance. I received a letter from our association's insurance agent-broker who was forced by an exceptional Criminal Fraud Investigator with the Dept. of Insurance to write a letter to the homeowner association admitting in so many words he stole money from us. He disguised broker's fees as premium. This is a broker who very likely insures over 2000 homeowner associations in the state of California, and he was only forced to return broker's fees to ***ONE*** *association. It was returned to the* ***ONE*** *association whose board of directors* ***refused*** *to pursue a refund. Had it not been for a homeowner who filed the complaint, that money would* ***never*** *have been returned because the board said they "like the guy." Instead of auditing* ***all*** *of this broker's association-client accounts and insisting he return all the hidden and illegally*

*obtained fees, the Dept. of Insurance closed the case once the **ONE** refund was issued.*

The CLRC's proposed "statewide dispute resolution information center" will be equivalent to nothing more than those old vacation t-shirts with fingers pointing in opposite directions: "They went thattaway." Homeowners will be referred to every agency in the state's already existing directory, and each will continue to do what they have done for decades: Nothing.

Background ~ Laypeople[8]

Common interest developments are governed by boards of laypeople, elected from among the unit owners. Faced with the complexity of common interest development law, many of these volunteers make mistakes and violate procedures for conducting hearings, adopting budgets, establishing reserves, enforcing parking, and collecting assessments.

Comment:

How many homeowners does it take to change a light bulb? None. In a real life illustration, homeowners who changed light bulbs without incident for twenty-five to thirty years were fired by their association boards. By today's industry and insurance standards, homeowners wanting to maintain their own property, are not "workers." Not unlike the CLRC's choice of words such as laypeople, bureaucrats who write the laws about where and how people live, consider homeowners a "liability" to the homeowner association.

*The CLRC's use of the words "laypeople" and "complexity" is curious indeed. As are references to mistakes and violations. The referenced **laypeople**, were apparently smart enough to save their entire working lifetimes to purchase a home, but not quite good enough or qualified enough to make **complex** decisions such as hiring a roofer, plumber or gardener without violating a stupid statute.*

*Lest the CLRC and the industries that advise you forget, the premise of deed-restricted common interest developments and homeowner associations was predicated on sharing responsibilities, self-containment, i.e., Volunteerism. Volunteerism by those who **OWN**. It was sold to the legislature as "affordable" housing. It was argued that by homeowners sharing through volunteerism the costs of this type of housing would be greatly reduced, thus "affordable."*

*Through the bastardization of California common interest development laws, "volunteers" are those persons identified by the statute, not those who actually own and volunteer. But the built-in statutory presumption is that boards of directors are volunteers merely because the statute states they are. Yet the statute also states there **must** be a board of directors." The fact that the board of directors' positions are mandatory in order for the homeowner association to legally function in accordance with the statute, also means there is nothing "voluntary" about serving on the board of directors. Add to that, the so-called "election" of a board of directors may look democratic but is anything but that. Regardless of what one might think, there is nothing spontaneous about homeowner association elections. There is much riding on that incoming board,*

[8] California Law Revision Commission, *Tentative Recommendation*, December 2002, page 1.

none of which will be left to chance.[9]

*With **no penalties** for boards and **no conflict-of-interest statutes**, homeowners complain of corruption on a variety of levels. For these reasons, the connection between volunteering for these positions and being a volunteer is also tainted.*

*Ingrained in the California statute with regard to indemnification and liability, is the indelible fact that **only** board of director members are considered voluntary homeowners, and not other homeowners. The pure volunteer no longer exists. Not that it doesn't want to exist, but that it has been driven into extinction by the industry, legislature and volumes of proposed laws emanating from the CLRC to the California legislature. The industry (with a little help from their legislative friends) has effectively eliminated the element of cost affordable self-management in common interest developments by taking away the voluntariness. There appears to be no problem in accepting money from laypeople.*

Housing Consumers[10]

Housing consumers do not readily understand and cannot easily exercise their rights and obligations.

Comment:

*This should surprise no one. Perhaps the reason housing consumers do not readily understand the situation they are in, is because **a)** there are no adequate **full-disclosure** laws **warning** consumers precisely **what** they are purchasing into; and **b)** one of the reasons consumers cannot easily exercise their rights is because once they purchase into a common interest development with deed-restrictions, they are charged with Notice of all restrictions. Rights are automatically forfeited upon execution of the purchase agreement. Remember, this is supposedly **private property.** Contrary to any other area of law where assumption of the risk entails full and truthful disclosure, inclusive of forthcoming documents, there are no such disclosures for common interest development purchasers.*

*Express assumption of risk can only occur when a homeowner, in advance of purchase knowingly and with full understanding of his purchase, gives his consent to relieve another of obligations owed to him by another, and agreeing to be responsible for any injury from a **known** risk arising from what the other person is to do or leave undone. Unfortunately, any restrictions on the new homeowner's liberties, rights, duties or obligations are all made known by the fact that the document is recorded thus binding the homeowner to its terms. That homeowner has automatically assumed the risk associated with his common interest property purchase.*

The Worst Disputes[11]

Many of the worst disputes appear to have started as relatively minor disagreements that have escalated as the parties have taken entrenched positions. If the disputes could be

[9] Vanitzian & Glassman, *Vote Appealing! Destroying the Myth of Affordable Community Living.*

[10] California Law Revision Commission, *Tentative Recommendation*, December 2002, page 1.

[11] California Law Revision Commission, *Tentative Recommendation*, December 2002, page 2.

resolved quickly and inexpensively, all concerned would be better off.

Comment:

To read the CLRC's Recommendation, one would think that an inconsequential clarification - a tweaking of sorts - inclusive of subject headings in the Davis-Stirling Act will clear up consumer confusion thus leading to an easy resolution. What the good people at the CLRC failed to appropriately delineate, is that presently, the laws governing common interest developments are drawn from among other things: •The California Davis-Stirling Common Interest Development Act (Civil Code section 1350 et. seq.); •Corporations Code; •Health and Safety Code; •United States Internal Revenue Code; •California Revenue and Taxation Code; •Vehicle Code; •Code of Civil Procedure; •Civil Code; •California Code of Regulations; and by the time you receive this communication, who knows what else.

Frankly, adding yet another layer of laws, by way of Alternative Dispute Resolution mandates, and headers, will predictably worsen this grotesque abomination of growing confusion.

RECOMMENDATION: THE "PLEASE, THANK YOU, AND I'M SORRY RULE"[12]

The authors of Villa Appalling! proposed, "The Please, Thank You, and I'm Sorry Rule." California codified what it called the "I'm Sorry" law.[13] It permits someone who is involved in an accident to make a statement expressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of a person involved in an accident and if made to that person or to the family of that person the statement is inadmissible as evidence of an admission of liability in a civil action. In other words, if you did something you felt was wrong, and someone else was injured, and you apologized, the apology could not be used against you in a court of law.

*The reason for adopting an "I'm Sorry" law for homeowners and boards, is to eliminate litigation, arbitration, mediation, a barrage of lawyer's letters and, in general, reduce the costs burden for both the association and the homeowner in trying to decide who's to blame. It is time for a similar law in the context of California's deed-restricted developments. An example of this is the very public California "swimming pool" case where a church going mother of three was publicly slandered and libeled when the board called her a "pedophile." The board proceeded to refer to the family derogatorily in the Minutes. All she initially wanted was a public apology, and in exchange she would agree to forgo litigation. The board stubbornly refused because, as they told the homeowners, "we are the board." The family sued the association at a cost of over $200,000 and a stain on the homeowner association's reputation. Even though the homeowner won the case, it did not prevent the arrogant association from violating the court's order. In fact, they fail to comply to this day. Who will bring a contempt order and at what cost? Will the proposed "information center" Wizard of Oz have an answer for this homeowner? How many times will **this** homeowner have to dial that 800 number to get another $200,000 worth of **unenforceable** justice? This board still says, "too bad - sue us again."*

[12] Vanitzian & Glassman, *Villa Appalling! Destroying the Myth of Affordable Community Living* (2002), at 345.

[13] California Evidence Code, section 1160. Evidence, Admissibility of Expressions of Sympathy or Benevolence.

When a board oversteps its bounds, targets a homeowner, neglects to fix the problem or prolongs the problem, they need to be able to cut to the chase, apologize and fix it. ***The authors DO NOT suggest that an apology, all by itself, is sufficient.*** *Unless the apology is coupled with* ***ACTION*** *to correct the problem, deficiency or persecution, the apology is an indication of bad faith and can be used as an admission of liability.*

Boards can diffuse potentially volatile relations by a mere apology. Homeowners want to hear an apology because of actions taken by the board targeting the homeowner as part of the frame and blame game. When the finger pointing stops, relations improve. Homeowners may feel they are part of the association instead of being isolated from it.

Attorney General Intervention[14]

The Davis-Stirling Act requires that members of an association be provided an annual summary of the ADR requirements. Attorney General intervention. Various provisions of the nonprofit mutual benefit corporations law govern the operations of common interest developments under the Davis-Stirling Act. The Attorney General has authority under the Corporations Code to intervene on behalf of members of the association who are denied certain rights by the association, including:

-Failure to hold regular meetings of members.

-Failure to allow a member access to books and records of the association.

-Failure to provide annual financial reports to members.

-Failure on request to provide a list of names and addresses of members.

Complaints may be submitted to the Attorney General's Public Inquiry Unit. After a review, the Attorney General will send, if appropriate, a "Notice of Complaint" letter with a copy of the complaint to the association, and direct the association to respond to both the Attorney General and the member within 30 days. The Attorney General is authorized by statute to go further, but does not ordinarily get involved beyond this. Lack of resources appears to be a significant factor in this determination.

Comment:

There are no penalties for boards that break the law. There are no "accuracy in accounting" laws. A board can supply a piece of paper titled Annual Financial Report and write a bunch of numbers down, and that's it -- they've complied with the Davis-Stirling Act. Home free. It doesn't matter what the Attorney General's offer to intervene is, because he doesn't intervene. After spending a considerable amount of time on the phone with the Attorney General's office, I can tell you that the aforementioned CLRC statement is ***not*** *exactly the way it is. Add to this, hundreds of copies of letters forwarded to us and our Associations column from homeowners turned away by the Attorney General's +office by a form letter. Frankly, what is a "Notice of Complaint" letter worth when there is no statutory penalty for the non-law abiding board members with an arsenal of paid attorneys at their disposal. Big deal -- the Attorney General writes a placating letter to the board and then turns around and sites "lack of resources." I suppose these are our tax dollars at work.*

Since the legislature has yet to realize the mistake of imposing the business stricture (i.e., forced incorporation, or mutual benefit corporation) on a residential

[14] California Law Revision Commission, *Tentative Recommendation*, December 2002, page 4.

model, perhaps the CLRC could recommend that homeowners would be better served with oversight by the Department of Corporations. This might make sense because the courts under the misguided belief that homeowner associations are real corporations, imposes the BUSINESS judgment rule in their dicta.

RECOMMENDATION: THE RESIDENTIAL JUDGMENT RULE[15]

As it relates to common interest developments, and until such deed-restricted communities are done away with altogether, the authors believe that the business judgment rule and its derivatives should altogether be eliminated and a new, temporary rule implemented termed the "Residential Judgment Rule" be applied until the entire residential commons is abolished. The "residential judgment rule" would require the court to consider the following criteria:

1) The basic rights of the homeowner qua homeowner are paramount without regard for the fact that the unit is located in a common interest development.

2) Whether such conduct would be the subject of the underlying action if the conduct had not occurred in a common interest development and if it would not be actionable the award is in favor of the homeowner.

3) Whether the board of directors of the common interest development has exercised its efforts to control conduct without regard for the individual rights of the homeowner and if it has the award is in favor of the homeowner.

4) The fiscal impact approving the homeowner's conduct would have on the common interest development as a whole, using the overall operating budget as a standard.

5) Whether the conduct of the homeowner is "reasonable" in light of all the circumstances, except for the fact that the conduct occurred in a common interest development.

6) Whether the conduct of the board was "reasonable" given the totality of the circumstances and whether or not the board created or exacerbated the situation.

7) Whether such conduct impacts all the other homeowners or merely one or two.

8) The impact the conduct of the homeowner has on the homeowner's immediate neighbors as if the homeowner did not live in a common interest development.

9) Whether the conduct complained of, ever occurred in the common interest development before (if it had occurred before, the award should be in favor of the homeowner).

Critique of Existing Law[16]

The Commission has also studied, but does not at this time recommend, establishment of a governmental regulatory program for dispute resolution. This recommendation was prepared

[15] Vanitzian & Glassman, *Vitto Appalling! Destroying the Myth of Affordable Community Living*, at 342.

[16] California Law Revision Commission, *Tentative Recommendation*, December 2002, page 5.

pursuant to Resolution Chapter 166 of the Statutes of 2002.

Comment:

Why not recommend a governmental agency? By its failure to establish a governmental regulatory program for dispute resolution, it condones the already existing mess left for homeowners. And, it is a ***costly,*** *and at times,* ***deadly*** *mess at that.*

Mandatory Registration Fees[17]

Mandatory Common Interest Development Registration Fee. "The Secretary of State is authorized to assess a registration fee of up to $30 per filing."

Comment:

Apparently there is something about charging fees that the CLRC doesn't seem to understand, so I will attempt to spell it out: Homeowners are sick and tired of the rising costs, assessments, mandatory rules and regulations resulting in fines, penalties, interest, and costs they cannot verify and can no longer afford. It is easy to be in the position of a governmental agency where a paycheck is received every week, and sit back and legislate those who are unemployed, on fixed incomes, or in poor health and in need of every cent to stay alive. From the mail our column receives, I can unequivocally relay to you, homeowners in common interest developments are at the end of their rope with paying out money with or without accountability.[18] *They equate their situations to that of being an "open-bank account" for the taking. The HOA-ATM.*

Florida, Nevada, Maryland[19]

The CLRC refers to Florida's law with mandated nonbinding arbitration or mediation as a prerequisite to litigation of a common interest development dispute. You state that reports of experience with the Florida system are mixed. Nevada's Ombudsman is funded by a $3 annual assessment on homeowners, and you state that it is premature to assess the success of the program. The CLRC claims that Maryland's dispute resolution process has been highly successful.

Comment:

These assurances of success are perplexing. My opinion is that Florida, Nevada and Maryland's arbitration and mediation services are unsuccessful, because if they were as successful as the CLRC represents, homeowners from those states would not be writing the Los Angeles Times Associations column in record numbers pleading for our assistance and in many cases, intervention.

[17] California Law Revision Commission, *Tentative Recommendation,* December 2002, page 8.

[18] Glassman & Vanitzian, *Use Voice and a Vote to Improve Situation (deteriorating quality of life issues article),* Los Angeles Times, April 1, 2001; *Board Member May Be Sensing Age Discrimination,* May 12, 2001.

[19] California Law Revision Commission, *Tentative Recommendation,* December 2002, page 9.

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Conclusion

RESTORE FIRST AMENDMENT RIGHTS FOR HOMEOWNERS

If the CLRC was interested in "Fairness" it would immediately eliminate the mandatory membership requirement, thus immediately restoring an individual's First Amendment rights to associate with whom they please. This means, membership in a homeowner association would be *voluntary* instead of *mandatory*.

ELIMINATE CORPORATIONS CODE SECTION 7215

If the CLRC truly sought "fairness," it would eliminate Corporations Code section 7215 as it relates to homeowner associations. This Code section allows Minutes, contrived by a board of directors to be entered into evidence as prima facie. Absolutely ***nothing*** could be farther than the truth (justice) than these often contrived (after the fact), constantly doctored (with no modicum of proof of accuracy), superficial self-serving (at the behest of the board) **"record"** of pomp and circumstance. It reads:

> The original or a copy of the bylaws or of the minutes of any incorporators', members', directors', committee or other meeting or of any resolution adopted by the board or a committee thereof, or members, certified to be a true copy by a person purporting to be the secretary or an assistant secretary of the corporation, is PRIMA FACIE evidence of the adoption of such bylaws or resolution or of the due holding of such meeting and of the matters stated therein.

Boards have every incentive to fabricate evidence by way of minutes to cover up their actions.[20] Unless there is an independent way to verify the accuracy of association board minutes they should not be admitted in a court of law and should be barred from entry as evidence.

CODIFY THESE THREE ISSUES AND YOU WON'T NEED MANDATORY ARBITRATION

The simplest route to a resolution for homeowners consists of only three minor steps: (1) Impose penalties against boards that break the law, enforceable by homeowners; (2) close the loophole in the California Corporations Code section 8333 and the California Code of Regulations section 2792.23 to give homeowners the ***same rights and access*** (as their neighbor homeowners who own property just like they do) to accounting books, minutes, inspection of association books and records, as board members with no stipulation that request for such lists have a "purpose reasonably related" to anything; and (3) make board of director meeting minutes *per se* ***inadmissible*** by removing any and all prima facie presumptions from the Corporation's Code. You won't need arbitration after you do that.

TIMELY AND MANDATORY DISTRIBUTION OF ALL BOARD MINUTES

In the event the CLRC does not feel minutes are important, take a look at the Los Angeles Times articles, *Ratification Is Fraught With Peril, Vacationing Owners Lose Their Condo* and, *Cliquish Board Won't Open the Books.*[21] An urgent correction in the Davis-Stirling Act is need to **mandate** homeowner association boards to **produce** and **distribute** board meeting minutes to **all** homeowners **within ten days of the meeting being reported and prior to their next board meeting**. Boards often contrive minutes and "fill in the blanks" to suit their own purpose, then, because there is no requirement for distribution, fail to provide copies to homeowners.

Often because of third-party interference (management companies) homeowners are held

[20] Glassman & Vanitzian, *Owners Intimidated by Actions of Overzealous Board,* Los Angeles Times, Sept. 8, 2002.

[21] Glassman & Vanitzian, *Ratification Is Fraught With Peril,* Los Angeles Times, June 9, 2002 *Vacationing Owners Lose Their Condo,* June 23, 2002; *Cliquish Board Won't Open the Books,* December 1, 2002;

hostage to exorbitant fees to obtain these copies, if they are able to obtain them at all. Usually homeowners are put through a series of hurdles consisting of a combination of letter writing, phone calls, threats, and "the boss is out of the office" excuses. Because of the Davis-Stirling Act the minutes (meant to PROTECT recalcitrant boards) are marked D R A F T. Why the minutes are not required to be finalized in a timely manner is beyond mortal comprehension. How difficult is it to produce a "F I N A L" set of minutes from a homeowner association board meeting?[22] It begs the question of those who recommend and write these preposterous bad laws, is "when did they expect the board to produce FINAL minutes?" Perhaps the answer is: The association board produces the minutes as an evidentiary document in court to support their position.

REMOVAL OF ALL COSTS FOR PRODUCING MINUTES, NAMES & ADDRESS LISTS, & CCRS

The cost of producing minutes and names & address lists, and CCRs for homeowners should be removed in toto. Homeowners have more than paid for these items through an excess of monthly fees collected without accountability (thanks to the Davis-Stirling Act), and instead of reproduction costs, this newly acquired source of cash has turned into a revenue producing fraud and manipulation tool for management companies and homeowner association boards to be used against homeowners. Holding homeowners hostage to a simple one to five page document is an outrage. Holding them hostage for a 50-page document is equally as outrageous in this era of technology. Some homeowners have been forced to write letters begging for these documents and then forced to provide acceptable reasons for wanting them. Even after bringing their own copiers to a management company office to take copies of the needed documents, they are **still prevented from doing so.** The latest management company-vendor scam encouraged by the Davis-Stirling Act's blatant bias and loopholes, is the self-substantiation of exorbitant copy fees.

Management company vendor personnel unabashedly tell homeowners "this is the **industry** standard, take it or leave it." Since when does the industry's self-imposed standard dictate what a **homeowner with a vested interest in property** pays. A piece of paper that should have taken seconds to produce has been known to take over two years to obtain.

Finally, though my name is unmentioned, I would like to thank the CLRC for incorporating several of my prior suggestions to the Commission into your recommendation. Albeit, not exactly in the manner I would have hoped.

Sincerely,

Donie Vanitzian

Enclosures:
Glassman & Vanitzian, *Associations* and *Common Interest Living,* Los Angeles Times:
- *Use Voice and a Vote to Improve Situation,* April 1, 2001
- *Board's Actions Don't Show Good Faith,* March 3, 2002
- *Board Member May Be Sensing Age Discrimination,* May 12, 2002
- *Ratification Is Fraught With Peril,* June 9, 2002
- *Vacationing Owners Lose Their Condo,* June 23, 2002
- *Owners Intimidated by Actions of Overzealous Board,* September 8, 2002
- *Cliquish Board Won't Open the Books,* December 1, 2002

[22] Glassman & Vanitzian, *Board's Actions Don't Show Good Faith,* Los Angeles Times, March 3, 2002.

Use Voice and a Vote to Improve Situation

Common Interest Living

By STEPHEN GLASSMAN and DONIE VANITZIAN
SPECIAL TO THE TIMES

Question: In question-and-answer columns I have yet to read an answer addressing the rapidly diminishing quality-of-life issue for some of us living in common interest developments with homeowners associations.

Our family is considered middle class. Some homeowners are on fixed incomes and others are barely making it.

It appears to me that in California, the restrictive covenant has been redefined to restrict the lives of those of us living in common interest developments. I feel utterly helpless because I am only one vote out of many that dominate how I now live.

I keep hearing the California Legislature refer to this type of housing as "affordable." They should see what this is costing me and others like me. Is there anything I can do?

Answer: Would you allow yourself to be dominated in any other context? If the answer to that is no, then why do you allow that to happen here?

Your one vote may be the impetus that others who feel as you do need to gain the confidence to vote with you.

Here is a plan for you to consider:

First, begin by becoming familiar with your governing documents, usually the covenants, conditions and restrictions. Second, look at your association's bylaws. Determine exactly what the association can and cannot do. Third, when your association acts in a way you believe is beyond the limits of its authority, call those acts into question via a letter to your board and keep a copy for your files.

Next, meet your neighbors, if you haven't already done so. You might be surprised to learn that they may hold the same views you do about your quality of life, about your board, about living in the neighborhood. These people can become valuable allies.

Try to build alliances. Collect proxies. Consider running for the board. Your other option: acquiesce and continue to watch your quality of life and your investment be devalued.

Last, you may have to consider a lawsuit against the board. Unfortunately, in California and many other states, the only real alternative to a recalcitrant board is the legal system. This can be costly, time-consuming and seemingly unproductive.

However, if it becomes apparent that homeowners' lawsuits are increasing as the method of enforcing homeowners' rights, perhaps the legislature will change the law to make boards more responsive to their homeowners.

Board Responsible for Verifying Name on Title

Q: For the last four years, our homeowners association board has refused to put my name on documents mailed to my family. Its members removed me from the board because they said I do not own my unit because my name is not on the title.

The board did not do a proper title check. If it had, it would have seen my name on title. I showed the board a certified copy of the title report and still it refuses to correct its records.

Do I have a duty to have the county recorder's office send the board and management company a certified copy, and why should I have to do the job of the management company?

A: Your delivery was good enough and it is irrelevant whether you provide, show or tell the board about the names on your title. You made the board aware of the names on title, putting both the homeowners association and the board on notice that they need to correct it. You don't have to get the county recorder to send a copy to the board.

It doesn't matter whether the management company or the board believes you, California law places the responsibility for title checks on the board, even though the board may turn that responsibility over to a management company. You can resend the title report to the board by certified mail, return receipt, but it will still have to be verified by the board.

The actions of a board and management company in removing you as a board member may be in violation of your association's codes, covenants and restrictions and bylaws. Check them; they should specify the reasons a member may be removed from the board.

The reason the board used for refusing to allow you to continue must be one that is in the governing documents. If not, you have a right to sue, but using a mediator might be a cost-effective and less stressful way to resolve this matter.

Stephen Glassman is a writer and attorney in private practice specializing in corporate and business law. Donie Vanitzian has written about American civil liberties, has a law degree and is an arbitrator. Both live in common interest developments and have served on various association boards. Please send questions to. Common Interest Living, P.O. Box 451278, Los Angeles, CA 90045 or e-mail: CID CommonSense@aol.com.

LOS ANGELES TIMES

Board's Actions Don't Show 'Good Faith'

Common Interest Living

By STEPHEN GLASSMAN and DONIE VANITZIAN
SPECIAL TO THE TIMES

Question: I sit on the board of my condominium association in Rancho Palos Verdes, and I don't like how the other board members manipulate the published minutes reported to the other homeowners.

Homeowners who attend meetings are allowed to raise issues before the board, but the board's secretary and the rest of the board parses the homeowner's words when they report it in the minutes. They intentionally twist what the homeowner says, then publish something the homeowner did not say or intend, but they attribute the quote to the homeowner. It is impossible for the homeowner to rectify this because the board has an unspoken rule to ignore homeowner contact.

We put things in the minutes that did not occur at the meeting. We falsify what we discussed during the executive session, and we basically cover ourselves with stuff we did not want to discuss in front of other homeowners. We also don't report the many gifts the management company and other vendors give us either.

I've been going along with these fraudulent routines for the six years I've been on the board. One board matriarch keeps telling us that because we are "volunteers" the law covers our actions and we can't get in trouble. I know as a board we've done some other things we should not have done, but the homeowners will never learn of these acts.

The president of the board tells us the attorney advised him that all we have to say is "whatever we do we did it in good faith." Is this true, or can I as a board member get in trouble for these things? If we are sued, will the courts protect us?

Answer: Your troubles were set in motion by your board's actions, then compounded by the attorney's advice to simply mouth the words "good faith" as a defense.

With privilege comes responsibility and you and your board have apparently enjoyed the former and ignored the latter.

Intentionally misrepresenting homeowner statements at monthly meetings, then falsely circulating them, is not tantamount to "good faith." It is possible that those actions constitute a fraud. Courts do not protect people; they serve as the arbiters of whether what was done meets the applicable legal standard for the case being tried.

If the acts do not meet that standard, board members may be personally liable for damages their actions may have caused.

Aside from the legal responsibility to repair and maintain the commonly owned property, every California homeowner association board member is held to a "reasonable standard of care," and must perform in accordance with the "ordinary prudent person standard" in making reasonable inquiries, serving all homeowners in good faith and making decisions in the best interests of the association (Corporations Code section 7231).

To avoid impropriety, homeowner association directors should disclose any conflict of interest involving transactions or material financial interests to the homeowners for their approval. Disclosure includes any vendor gifts to board members.

The Corporations Code says that a board member with a conflict should refrain from voting on related issues.

The cavalier attitude of not worrying about your actions because insurance covers "volunteer"

members is a breach of loyalty to all the homeowners. The Corporations Code also states that "a person who performs the duties of a director in accordance with" the Code "shall have no liability based upon any alleged failure to discharge the person's obligations as a director."

But if the insurance company feels that the acts of the director were not a part of the person's obligations they may decline to cover that member for those acts, possibly exposing board members and other homeowners to liability.

Civil Code section 1365.7 of the Davis-Stirling Act accords a statutory immunity for homeowner association board members, protecting them from personal liability if the following conditions are met: (1) The act or omission was within the scope of the director's or executive officer's duties; (2) The act or omission was performed in good faith; (3) The act or omission was not reckless, wanton, intentional, or grossly negligent; and (4) Damages caused by the act or omission are covered pursuant to the association's liability insurance policy, which must be in place in accordance with the Act.

The code adds "the volunteer director or volunteer executive officer shall not be personally liable for the damages if the board of directors of the corporation and the person had made all reasonable efforts in good faith to obtain available liability insurance."

These statutes were enacted so homeowners would volunteer to serve on association boards without fear of personal liability in a lawsuit. They were not passed for board members to circumvent the law or their duties.

Merely saying you acted in good faith is insufficient to establish that you, in fact, did.

Stephen Glassman is a writer and an attorney specializing in corporate and business law. Donie Vanitzian, J.D., is a writer and arbitrator and manages commercial property. Send questions to: Common Interest Living, P.O. Box 451278, Los Angeles, CA 90045 or e-mail queries to [redacted]nsense@aol.com.

Board Member May Be Sensing Age Discrimination

Common Interest Living

By STEPHEN GLASSMAN and DONIE VANITZIAN
SPECIAL TO THE TIMES

Question: At 80, I am the oldest member on the board of our Palm Springs-area complex.

During the last few years a younger generation has moved into this complex. I believe because of my age I am discounted by the other, much younger board members. The younger owners have a very different attitude toward money and the way things should be done.

The problem is that these board members are excluding me from the "real" meetings. Every time they call a meeting they go straight to a motion and a vote, and my presence and input are meaningless.

When I was elected, I promised the homeowners that I would represent their interests, but that is not happening. I believe the reason I am allowed on the board is because the other members thought I would go along with their "business as usual" tactics. This board doesn't want homeowners to attend meetings, so they let the homeowners come in, mill around for a while and, after they leave, call the meeting to order.

I do not like or agree with what the other board members are doing and have tried to voice my concerns, but I am ignored. I must admit I am a bit afraid to speak up because of my age. I brought this to the attention of some other homeowners, who told me if I didn't like it to get off the board or move out.

I'm not sure what is happening, but it doesn't feel right. I feel like I am living in a surreal situation. Is there anything I can do about this?

Answer: It doesn't feel right because it's not right. The Davis-Stirling Act requires that meetings "of the membership of the association shall be conducted in accordance with a recognized system of parliamentary procedure or any parliamentary procedures the association may adopt."

One such system, Robert's Rules of Order, is one of the oldest guides on the subject and explains procedures for motions.

First the motion is made; then it is seconded, followed by discussion and voted on. Failure to follow procedure may not invalidate the motion, but it means the board is breaking the law, and it calls into question whether the board is legitimately interested in its fiduciary duties to all the homeowner-members of the homeowner association or the board members merely in serving their own interests.

The Open Meetings provision of the Davis-Stirling Act gives all homeowners the right to attend board meetings. If the board waits until the homeowners leave before calling the meeting to order, they are breaking that provision of the law as well.

Having been elected by the membership, the board is charged with managing the association.

Regardless of how unfair it may seem, ignoring or outvoting you is of no consequence to the conduct of meetings. Your age should play no part in the decision-making process.

The reaction from other homeowners, telling you to get off the board or move out, is cause for concern. This response indicates the growing difficulties of dealing with a board whose intention is to rule rather than govern.

Do not be discouraged. Continue voicing your opinions to the board and make certain your comments and votes are recorded in the minutes. Often, individual legal liability can be avoided if you show your "due diligence" by lodging an objection or discussion on the record and voting against a project when all others are in favor, or vice versa.

Should those who elected you find that this board does not respect their wishes, they may finally elect others to the board who will.

Stephen Glassman is a writer and an attorney in private practice specializing in corporate and business law. Donie Vanitzian, J.D., is a writer and arbitrator and manages commercial property. Both live in common interest developments and have served on various association boards. Mail questions to Common Interest Living, P.O. Box 451278, Los Angeles, CA 90045 or e-mail to cid commonsense@aol.com.

EX 17

'Ratification' Is Fraught With Peril

Common Interest Living

By STEPHEN GLASSMAN and DONIE VANITZIAN
SPECIAL TO THE TIMES

Questions: There are 50 units in our planned community development encumbered with deed restrictions. The board pre-plans each annual homeowner association meeting so members are unable to fully participate. Board members enlist friends to make predetermined motions and seconds from the floor. To create a rushed environment, meetings are held in a public place with time restrictions.

At last year's annual meeting, a friend of the board made a motion from the floor to ratify all the actions of the board for their two-year term, and another friend of the board immediately seconded it. In my 30 years of attending annual meetings, this was the first and only time a motion to ratify was made. Most of us did not know or understand the meaning of "ratification," and the board did not explain.

The board's goal was to hurry a ratification vote because of unscrupulous actions taken throughout their two terms. The vote ratified those actions.

Members asked questions about the management company, our bank records and the various contractual agreements that were made and were matter-of-factly told, "We are the board, and the law says homeowners don't have a right to know, so we don't have to tell you." Some voted against it, but the majority were pressured into voting for ratification, even though they had no clue what it meant or what they were voting for. The management company was present and documented each vote. I kept my own tally.

At this year's annual meeting, a motion was made to amend last year's minutes to include the ratification vote breakdown. The board refused and said it don't know what the last annual meeting votes were and that no one kept a tally.

I find its actions suspicious. What is ratification, and did I do the right thing in voting against it? How does this ratification vote affect the homeowners who voted for or against it?

Answer: "Ratification" is arguably the most dangerous word associated with deed-restricted property located within a common interest development or planned community setting.

In the corporate and legal sense, ratification means approval of all board actions, even if those acts were unauthorized, fraudulent or incur liability to the association and all its homeowners.

After the vote for board elections, a ratification vote is probably the most important vote homeowners can make, and it has far-reaching implications for all homeowners. Merely asking that the board's acts be ratified is not enough to warrant voting in favor of ratification.

Should a lawsuit against the board result from a breach of that contract, the entire association may be liable, because it has ratified the board's actions.

Acts that might be illegal and result in liability only for an offending board member can lead to liability for every homeowner if those acts are ratified.

Among the legal requirements for ratification is a full explanation of what act is being ratified. California courts have said that regardless of the capacity to understand transactions, one must have notice of those transactions before he or she can be held to assent to them. Notice means the board has the duty to describe in detail every act

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for which ratification is being sought and deliver that description to each homeowner who is being asked to ratify.

Although there is no specific wording in the Davis-Stirling Act requiring that board acts be ratified or requiring this type of notice, the cases interpreting ratification votes make that notice requirement mandatory. The board's failure to include in the minutes a record of the vote on ratification may be indicative of its efforts to hide actions that could conceivably result in homeowner liability.

Although no law requires the board to maintain voting records for any time period—and the California Senate recently rejected such legislation after near unanimous passage by the Assembly—your board's admission that it did not keep the votes could establish that the parameters for approval or ratification were not met.

If the homeowner does not understand the actions being ratified or the board fails to explain them satisfactorily so that homeowners are confident voting for ratification, then rejection is the homeowner's safest option.

A legal parallel is when one co-signs for a loan and the borrower defaults. It is the co-signer who has to pay. The same applies to homeowners when a board member signs a contract without authority, then later asks for ratification. When homeowners ratify that act, they have figuratively become "co-signers," making them liable.

Though there are exceptions, if you don't know what you are ratifying, because your association has not identified each of the acts for which they were seeking ratification, the vote could be invalid.

Stephen Glassman is a writer and an attorney in private practice specializing in corporate and business law. Donie Vanitzian is a writer and arbitrator and manages commercial property. Both live in common interest developments and have served on various association boards. Please send questions to Common Interest Living, P.O. Box 451278, Los Angeles, CA 90045 or e-mail CIDCommonSense@aol.com.

Vacationing Owners Lose Their Condo

Common Interest Living

By STEPHEN GLASSMAN and DONIE VANITZIAN
SPECIAL TO THE TIMES

Question: We bought a condo in California because we did not want the bother of having to hire gardeners and other responsibilities that come with owning a home. We paid for it in full so we would not have a mortgage.

We bought the largest unit in a prime location and installed state-of-the-art fixtures and appliances, wood floors and copper plumbing. But we learned quickly the other homeowners didn't like us because we did not partake in association activities.

We decided to retire and take a vacation sailing for nearly two years. We paid our homeowner association dues, utilities and property taxes upfront. We notified the board and neighbors of the sailing trip and how long we would be gone.

Upon return, a stranger was living in our condo. Apparently in our absence, homeowners rallied their friends on the board to fine us for a collection of contrived violations. Then they made sure the association raised the amount of regular monthly dues and voted to specially assess for new garage doors, something the board assured us they would not do.

We were unaware that outstanding fees and fines existed, so we obviously couldn't pay them.

In our absence, the board wasted no time placing a lien on our home, then nonjudicially foreclosed.

The association put our personal belongings in storage, and when we "failed to retrieve them in a timely manner," they sold them at a garage sale and sent us the storage bill.

They now threaten court action for storage fees.

Our attorneys explained that because of the time lapse between foreclosure and our objection to it, we have no recourse against the association. Even the homestead on our home did not prevent the foreclosure.

Must we pay the storage fees and can we get back our personal belongings? Can we sue the board and our neighbors for foreclosing?

Answer: California legislators apparently did not anticipate that people living in common interest developments sometimes take extended vacations, and that merely following the law, as your board presumptively did, would expose the homeowner to the devastating loss of such a large asset.

The law protects boards and their actions, and there are no penalties for a board that uses the law against homeowners. California Code section 703.010 lists property exempt from attachment by a judgment creditor.

However, in section (b) the law says that the exemptions do not apply if the judgment is for the foreclosure involving a lien encumbrance on the property.

Your homeowner association placed a lien on your home, which began the road to foreclosure. A homestead only protects a portion of the equity you have in your home from judgment creditors. Whether the actions of your board constituted some form of embezzlement or fraud, those acts did not serve to make the board judgment creditors.

This loophole allowing foreclosures in common interest developments for failure to pay regular, or in your case, special assessments without providing *actual* notice to the homeowner is an issue the Legislature has not addressed.

The difference between the regular monthly fees you paid in advance, and the new amount voted in by your board, can also become a lien against your property.

The board's legal duty is to repair, replace and maintain the common property. The board's fiduciary duty is to treat all homeowners fairly and assure that their homes will not be taken from them as was yours.

An honorable attorney knows the board owes this fiduciary duty to all the homeowners and would not advise a board to foreclose under circumstances like these without ensuring that the homeowner received actual notice. Constructive notice, permitted by law, is insufficient when your home and lifetime possessions are at risk.

While legally it may be enough for a board to follow the minimum requirements permitted by law regarding notice of assessments and possible foreclosure, in a case like yours, where your board knew you were going to be away, the duty owed to you, it seems to us, rose to a higher level.

A qualified lawyer can determine if you have a cause of action against your board for their acts in foreclosing on your home. You also need a second, even a third, legal opinion in hopes of uncovering a misstep in the prior court proceedings to overturn the results of the board's actions.

Recovering storage fees or the value of your possessions will depend on the board's following *all* the required procedural steps before the taking of your property.

If the storage company's sale of your belongings also failed to follow the required procedure, it could be liable to you for the value of those possessions.

Stephen Glassman is a writer and an attorney in private practice specializing in corporate and business law. Donie Vanitzian, J.D., is a writer and arbitrator and manages commercial property. Both live in common interest developments. Send questions to: Common Interest Living, P.O. Box 451278, Los Angeles, CA 90045 or e-mail your queries to: CIDCommonSense@aol.com.

LOS ANGELES TIMES

Owners Intimidated by Actions of Overzealous Board

Common Interest Living

By STEPHEN GLASSMAN and DONIE VANTZIAN
SPECIAL TO THE TIMES

Question: We live in a development of 30 townhouses with very little common area. Our board hired a management company because homeowners wanted to be on the board but said they didn't want to do the work. But since that hiring, the board is doing more than ever.

In their fervor to do their jobs, board members have become such patrol and control freaks that we refer to them as the "condo police."

They are preoccupied with minutiae while the big problems remain unresolved. Board members examine the grounds, concerning themselves with insignificant details and looking for things to do such as turning the sprinklers on and off five times a day, even if it ends up killing the plants.

They open garbage can lids and go through the trash of individual homeowners, or spot a wire that doesn't look quite right so they whip out their notepads and start writing. We barely have any gardening needs, yet the board gardens everyday, even though the gardeners come three times a week.

The contractors used to come when needed, but now the board tinkers along with the contractors and vendors as they work.

The board is consumed with conducting patrols in front of our homes, equipped with yellow notepads, soil meters, decibel counters and other devices to assist in their patrols. Not content in controlling the outside, they are now concentrating on what homeowners put in their patios.

The result is constant noise pollution and an incredible lack of privacy. When a homeowner complains about the board's behavior, the owner is told to "move out." Even though the other homeowners feel as I do, I am the only one who still speaks up. The board's nitpicking is unnerving, but what can I do about it?

Answer: Living in a common interest development can present many challenges. Homeowners may have to contend with a board of directors whose actual duty and perceived duties are quite different.

Boards and members like the ones you describe believe they are obligated to ensure all owners live in accordance with what that board decides is appropriate. This can happen in a common interest development when the board's duties under the Davis-Stirling Act—to inspect, repair, replace, restore or maintain—interfere with the imposition of personal beliefs about the use and enjoyment by individual owners.

There is no reason why the vendors and their workers must disturb the quiet enjoyment and privacy of the very residents who pay their salary.

If in carrying out their board duties, members interfere with the enjoyment of your unit, they can be sued. Homeowners are cautioned about the growing expense and anxiety attached to lawsuits, however, and litigation is recommended only as a last resort.

Mediation and arbitration offer little alternative and should be avoided in this circumstance because your remedy should include an injunction barring these "patrols" from interfering with your property and enjoyment of life.

Write the board a concise letter explaining the problems regarding their intrusion into your privacy and give them a deadline to respond. Keep detailed notes of the events occurring before and after you write.

Whether the board is overzealously carrying out its duties is a question that may ultimately be decided after litigation, a disappointing reality of owning a home in a California common interest development. California laws in the aggregate work to protect boards and board members, not individual homeowners, thus making it difficult for homeowners to resolve problems like yours.

When the other owners' lives are interrupted to the extent yours is by the noise, inspections, note taking and rummaging through trash, you may have the support you need to take action. Unresponsive boards have been voted out, and we know of several boards in recent months that were replaced by homeowners fed up with the board's treatment. Until then, existing law allows your board's nitpicking and nerve-grating intrusions to continue.

Stephen Glassman is a writer and an attorney in private practice specializing in corporate and business law. Donie Vantzian, J.D., is a writer and arbitrator and manages commercial property. Both live in common interest developments and have served on various association boards. Please send questions to: Common Interest Living, P.O. Box 451278, Los Angeles, CA 90045 or e-mail your queries to: CIDCommonSense@aol.com.

EX 20

ASSOCIATIONS

Cliquish board won't open the books

By STEPHEN GLASSMAN AND DONIE VANITZIAN
Special to The Times

Question: We have deed restrictions on our house in Valencia that cause us nothing but grief because they mandate a five-member board of directors. The president knows he only needs three votes to pass whatever motions he wants, so he automatically discounts the other two board members. The treasurer is part of the longtime dominant clique of rotating owners that make sure three members from this elite group are on the board at all times.

Recruiting new owners for the board is a sham. For more than 10 years the treasurer has occupied the same position. She works closely with each new president guarding the "real" financial information from other board members.

Non-board members are prohibited from seeing vital financial information. Five times I've been on the board with the clique, and five times I've been denied access to the books.

During the past decade, two scenarios are consistent. First, at annual and monthly meetings the treasurer explains she has not received all the "numbers" from the management company, so will have to get back to us; and, second, she has all the "numbers" from the company but hasn't "fixed" them yet.

The treasurer is provided with reams of financial documents she shares only with the president. I suspect the treasurer, president and their clique engage in "creative accounting" consisting of hiding and juggling numbers. The material that is distributed is overly broad and general in nature. The numbers don't add up, and none of the so-called financials distributed to owners in that 10-year period has been accurate, let alone truthful.

From what I can tell, the clique has managed to nearly bankrupt us through incompetence and spending sprees. I can't find anything in the Davis-Stirling Act that gives homeowners the right to audit their homeowners associations' books without restraints or where there are penalties for boards that use "creative accounting" methods to cover their actions.

Can I audit the association's books and records without interference? If I find wrongdoing can I sue the past presidents and the treasurer for their years of creative accounting?

Answer: The Davis-Stirling Act gives homeowners the right to enforce the association's covenants, conditions and restrictions. It also requires boards to provide various documents each year at the association's annual meeting. Documents that are sparse, general in nature and insufficient for adequate homeowner oversight, with no way to confirm their accuracy, are far less than the law requires.

The Davis-Stirling Act fails to give homeowners an automatic right to sue the association for faulty accounting or the absolute right to review the association's books and records. Your right to review the records, found in the Corporations Code and the Administrative Code, is contingent upon a determination that your request relates to your standing as a homeowner. That decision is made by the board, so it is easy to imagine that the request could be denied. Legislative attempts to correct this have been defeated.

The fact that the management company provides reams of documents regarding the financial health of your association and that information is then manipulated or kept from homeowners is understandably cause for concern. Such acts are a breach of the duty owed by the board to the other homeowners and can be a steppingstone to liability.

By the time a lawsuit is brought and comes to court, the association books could be long gone or rewritten. At the very least, if a court-ordered review reveals the "creative accounting" feared, you might be able to recover some funds under the association's insurance policy, from the board members directly or from those who aided and abetted the practice.

Removal of the board, even the election of board members outside any domineering rotating clique of homeowners, is no guarantee that there will be a change.

It may sound fruitless, but writing your legislator and requesting the Davis-Stirling Act be amended to include rights for homeowners to audit their association books and records and to impose penalties against boards that break the law, is a step worth taking.

Stephen Glassman and Donie Vanitzian are co-authors of "Villa Appalling! Destroying the Myth of Affordable Community Living" (Villa Appalling Publishing). Send questions to P.O. Box 451278, Los Angeles 90045 or e-mail NoExit@mindspring.com.

CONGRESS OF CALIFORNIA SENIORS

March 28, 2003

Nathaniel Sterling, Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303
Via e-mail: agenda@clrc.ca.gov and bhebert@clrc.ca.gov and fax: 650.494.1827

RE: Tentative Recommendations: Alternative Dispute Resolution (ADR) in Common Interest Developments: December 2002

Dear Mr. Sterling and Commission Members:

The Congress of California Seniors[1] (CCS) wishes to comment on the December 2002 tentative recommendations from the California Law Revision Commission on Alternative Dispute Resolution (ADR) in Common Interest Developments. We understand that because of the state holiday, CLRC will be taking written comments through April 1.

CCS is concerned in general about consumer issues and in particular about the treatment of seniors and the disabled by California's 35,000 homeowner associations, since seniors occupy an estimated 42% of all California condominiums. CCS also signed the CID Homeowner Bill of Rights delivered to the Commission in September 2001.

Last session the Congress of California Seniors sponsored consumer legislation, AB 2289 (Chapter 1111), signed by Governor Gray Davis in September 2002, which provides some due process to CID homeowners facing nonjudicial foreclosure for small amounts of unpaid assessments. On signing AB 2289, the Governor cited it as consumer legislation; it became effective in January 2003.

CCS agrees that ADR is needed by common interest developments – both by association boards and by property owners. The reports of Sentinel Fair Housing (Oakland)[2] delivered to the California legislature as well as broad anecdotal evidence coming to CCS establish clearly the need for a mechanism besides the courts for dispute resolution in CIDs.

The legislature itself also recognizes the need for some form of ADR: in connection with disputed assessment collection, for example, as required by AB 1317 [Speier] and now chaptered into law (Chapter 1101, 1996.)

[1] Established in 1977, the Congress of California Seniors (CCS) is a statewide nonprofit education and advocacy organization dedicated to improving the lives of seniors and their families. Based in Sacramento, CCA represents 650,000 California seniors. CCS initiates and monitors legislation, testifies at hearings, and takes grass-roots action on issues impacting seniors, many of whom are disabled.

[2] November 29, 2001 and May 7, 2002

In commenting on ADR for homeowner associations, the guiding principles for CCS are that any system set up in California for resolving CID disputes:

- Make maximum use governmental and non-governmental infrastructures already in place
- Make maximum use of limited resources, given
  a. The state budget crisis
  b. That information about ADR must reach 35,000 associations in all 58 counties and the 8 million people who live in them.

We will address CLRC's recommendations (2) and (3) together, i.e. that a statewide dispute resolution information center readily accessible by CIDs be established and that every CID offer its residents a simple, cost-free way to have their concerns heard and addressed.

We strongly recommend that the State of California use the ADR infrastructures already in place at the Department of Consumer Affairs, because:

1. DCA administers the Dispute Resolution Programs Act of 1986 and accompanying regulations, i.e. DCA is the state's enforcement agency for ADR and has a longstanding commitment to ADR administration. Given the state budget crisis, it is imperative that we use systems already in place and not create new ones, which cost money.
2. The infrastructure for disseminating information to the public about ADR is already in place at Consumer Affairs through its Consumer Relations and Outreach Division, through its Dispute Resolution Office, and through the courts. It is not apparent to us that the Secretary of State's office has a comparable infrastructure in place.
3. Monies that would be spent creating a new information center with the Secretary of State could be better spent by DCA on expanding ADR programs for homeowner associations, especially in those counties, which do not yet have them. About 31 of California's 58 counties have ADR programs already in place.
4. The infrastructure for financing ADR programs in already in place at DCA through the Dispute Resolution Programs Act. The Department knows how to help counties and nonprofit agencies create and support ADR programs through the courts and through local consumer agencies. Again: monies collected from homeowner association corporate registrations could be better used by DCA to expand and strengthen county and community-based programs in counties like Los Angeles and San Diego with thousands of CIDs and in rural areas where mediation services may be limited.
5. DCA already has a Dispute Resolution Office; there is no need to create another one in another state agency.
6. The mission of Consumer Affairs – consumer rights and responsibilities, consumer education, and consumer protection– are all consistent with the goals that CLRC is trying to reach in recommending ADR for homeowner associations.

In short: the problem about connecting CID boards and property owners to dispute resolution programs is not so much that the programs are not available, but that residents and boards alike do not know that such programs exist – or even that they have a right to ADR under the current Davis-Stirling Act, because this information is withheld from both boards and residents alike. Lengthy evidence to support this premise was laid out in the March 30, 2001 written testimony to the CLRC by CCS member, Marjorie Murray.

Financing of ADR Programs/Services

As indicated above, we propose – as did Ms. Murray in her May 4, 2001 written testimony to the Commission – that CID corporate registration fees be used to expand/strengthen the existing Dispute Resolution Office in the Department of Consumer Affairs.

In addition, we urge the Commission to revisit its own suggestion that ADR programs could be financed through a $1 or so "per unit" annual tax on each of California's 3.5 million CID homes. Such a tax would be much cheaper than the maximum $4,500,000 that the CLRC estimates is spent each year on CID litigation.

Improvements to Existing ADR Law

Finally, we have some comments on the CLRC's first recommendation that improvements be made to existing ADR law:

1. We have strong concerns about the proposed "default" dispute resolution plan on p. 7 of the tentative recommendations, i.e. that if an association fails to provide a dispute resolution program to residents, that the board itself appoint one of its members to meet with the homeowner and settle the matter "on the spot."

   As we understand it, the essence of ADR is that a neutral mediator negotiate the settlement between two disputing parties. In CIDs, the dispute is frequently between the board itself and the property owner. So any ADR system controlled by one of the disputants – i.e. the board -- is doomed to fail. The dispute should be resolved through a mediator external to the HOA itself, e.g. to a community-based dispute resolution program.

2. Though the CLRC, at this time, is not recommending that ADR be made mandatory, we would have strong concerns about such a plan. We will wait with great interest the CLRC's analysis of the Los Angeles County pilot projects involving mandatory mediation.

3. Attorney General Intervention: we recommend that homeowner complaints to the AG's Public Inquiry Unit concerning access to CID corporate records be copied to DCA's Dispute Resolution Office.

Sincerely,

William Powers
Legislative Director

cc: Ann Richardson, Governor's Office
Kathleen Hamilton, Director, Dept of Consumer Affairs
Laurie Ramirez, Deputy, Dept of Consumer Affairs
Albert Balingit, Dept of Consumers Affairs Office of Dispute Resolution
Marjorie Murray, CCS Legislative Committee

March 28, 2003

Brian Hebert
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, Ca 94303

Dear Mr. Hebert,

My name is Sarah Calderon, Executive Director of the Berkeley Dispute Resolution Service (BDRS). BDRS is a community-based mediation program funded in part by the Dispute Resolution Programs Act overseen by the State Department of Consumer Affairs.

The following comments are my own and do not represent BDRS, other similar programs or any other organized association of mediation programs.

I have reviewed the tentative recommendations of the CLRC and while I agree with the general direction of the recommendations I have a few suggestions that might enhance your proposal.

1. RE: the recommendation that alludes to local mediation centers and the need for a dispute resolution information center to make homeowners aware of such centers;

I recommend that specific language regarding the State Department of Consumer Affairs' Dispute Resolution Program Act (DRPA) be referenced in the proposed improvements to the law. Through the DRPA there is a statewide network of community-based mediation programs that are underutilized by the general public.

There is a need to improve public awareness of local mediation programs. Instead of a dispute resolution information center, I would propose that a direct link be made with the State Department of Consumer Affairs. Consumer Affairs should be the information center/clearinghouse and provide additional links to appropriate mediation resources including local centers. I would also suggest that the Consumer Affairs list all of the state mediation centers on their website (I don't think they're listed).

2. RE: the recommendation that every homeowner's association must make available a fair, reasonable and expeditious internal dispute resolution mechanism at no cost to its members.

If homeowner's were aware of the already existing network of mediation centers, then many could take advantage of the low-cost (in some cases no cost) services available to them that could address many of the types of disputes in question. One concern that I would address however, is the fact that many mediation centers are financially strapped and may not have the capacity to take these cases on without compensation.

I would suggest that the homeowner associations be assessed a fee for mediation services and that the mediation program in the county where that homeowner association is located be contracted to provide mediation services.

Thank you for your work on this commission. I hope my comments are helpful.

Sincerely,

Sarah Calderon

SAMUEL L. DOLNICK
5706-348 Baltimore Drive
La Mesa, CA91942-1654
Phone/Fax 619-697-4854

March 28, 2003

VIA FAX: 650-494-1827

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Comments on Tentative Recommendations on Alternate Dispute Resolution in Common Interest Developments of December 2002.

Dear Commissioners:

After reviewing the Tentative Recommendations, I would like to offer the following suggestions and comments.

SUMMARY OF TENTATIVE RECOMMENDATION
(3) "A statewide dispute resolution information center should be established that is readily accessible by associations and their residents, to provide information about the governing law and about the availability of local dispute resolution mechanisms."

Comment: This is a laudable goal, however, this is another instance where the association is required to assume the burden of increasing their assessments in order to pay for extra money necessary to abide by the Commission's recommendations.

1363.7
Page 16, lines 21-23. "The Secretary of State should set the fee authorized by Section 1363.6 (common interest development registry) at a level sufficient to maintain both the information center and the registry."

Comment: Section 1363.6 states that the fee for registry should not exceed thirty dollars. The recommendation places no limit on what the Secretary of State may charge for the information center. This allows for fee increases each year without Legislative approval. Whenever the law mandates that the associations have to pay a fee, should an assessment increase be necessary to pay the fee, these mandated fees should be excluded from the 20% the association may raise the fees without a vote of the membership. These state-mandated fees are not part of the association's maintenance and upkeep responsibilities. The board should not have to be vilified by the membership when state mandatory fees are imposed.

1363.840
Page 18, line 16. "The request may be oral or written, by whatever means appears to the party appropriate to communicate the request."

Comment: The request should be in written form only. Too much controversy can result from an oral request. The request can be made to any board member, outside of an official board meeting. The board member may ignore the statement, thinking that the resident is just talking, and then the difference of opinion occurs. If the Commission thinks that an oral request is absolutely necessary, then the request should be made to the board of directors when a quorum is present. It is best to create a paper trail because one never knows when a dispute will end up in court.

Page 18, lines 21-23. "If the association is not a party to the dispute, but the parties request participation of the association, the board of directors shall designate a member of the board to participate.

Page 18, lines 26-27. "If the association is not a party but participates on request of the parties, the board designee shall seek to facilitate resolution of the dispute."

Comment: Why should the association, who is not a party to the dispute, mediate between a member to member dispute? The association could become a party to a lawsuit if one of the parties to the dispute takes issue with how the board member mediates the process. Or one of the members to the dispute could claim that the board member favored the other party, etc., etc. The association is charged with maintenance, improvements and control of the common area. The law should not force the volunteer board members to solve or be a part of any dispute between members unless and only unless the issue involves the common area.

Thank you for your consideration of the material above and for allowing comments to the recommendations.

Sincerely yours,

Sam Dolnick
Homeowner

CLRC-ADR, 3-28-03

Date: Sun, 30 Mar 2003
To: Brian Hebert <bhebert@clrc.ca.gov>
From: Robino <jrobino@mail.omsoft.com>
Subject: Re: HOA, litigation and ADR
Cc: Writzy@aol.com

Hi,

I read the Commission's proposal and think it's filled with nice thoughts.

But I didn't see anything in it that would have made my situation better nor do I think it has anything in it that can or will make things better for any homeowner in a CID.

Plus, it could be streamlined without missing a beat. For instance, there is a substantial amount of verbiage given to alternatives if the association is a party to the complaint or has been asked to join in the process.

In real life the association is a party to All complaints. Maybe in the old days one neighbor tried to enforce CC&Rs against another neighbor's barking dog or something like that. But those days are gone. Associations are big business, now. They get involved in every aspect of everything in a neighborhood CID.

And, of course, they do it because they Want to be involved in everything. They act the way they do Not because there is no state repository of good thoughts to draw on, they are litigious because they like it that way. It's an opportunity to spend other people's money and be important ... while remaining immune from any and all personal liability.

In regard to "some form of fair, reasonable, and expeditious dispute resolution procedure" ... the Association will all tell you that they already have it. It's known as a meeting with the Board of Directors. At that meeting the Board will listen to a homeowner's complaint and render a fair and impartial decision against him.

In my opinion any legislation that relies on voluntary compliance is a waste of effort.

-robino

Date: Mon, 31 Mar 2003
To: Writzy@aol.com
From: Robino <jrobino@mail.omsoft.com>
Cc: thebairn@pacbell.net, Brian Hebert <bhebert@clrc.ca.gov>
Subject: Re: HOA, litigation and ADR

Hi Marjorie,

> The Law Revision Commission wonders [in its white paper] whether ADR should be mandatory for both homeowner and CID board. What do you think about that?

First off, anything that is not mandatory will not affect the current state of associations.

Second, not only does ADR have to be mandatory to have an impact, the form of ADR must also be something that's impartial.

BTW, if the homeowner has a conflict with the Board, and rejects the Board as being the sole judge of the outcome of that conflict, then the Board in my village will propose a hearing in front of an arbiter of the Board's choice, limited to two hours, with all of the costs borne by the homeowner.

In my opinion the Law Revision Commission's proposals would be ineffective at best.

At worst they give people the false impression that progress is being made and they slow any meaningful reform that might occur in the absence of their proposals.

-robino

Just my opinion, of course.

Date: Mon, 31 Mar 2003
From: “Eileen Findlay” <thebairn@pacbell.net>
To: “‘Robino’“ <jrobino@mail.omsoft.com>, <Writzy@aol.com>
Cc: “‘Brian Hebert’“ <bhebert@clrc.ca.gov>
Subject: RE: HOA, litigation and ADR

I concur with John. Upon reading the Bill, there is barely any discernible difference from what is now “on the books” so to speak. Also, Bill 104, is currently already part of our CC&Rs, in that Members are legally entitled to view and copy the financial and other records of the Association. However, the GRCA has consistently denied Member’s access to records, including would you believe, the minutes of meetings of their own respective Villages.

Bill 512, regarding Article 4. Operating Rules - this is also currently part of our CC&Rs, especially Sutter Village, wherein it states that Rules may be changed or created with the input of the Members, in other words it’s not up to the Board to decide. Also, regarding the rules changes, that owners must be informed regarding potential rules-changes and given 30 days to make comments is already part of the Civil Code. I’m not sure about 1357.170 (a), is that new or does it already exist in the current Civil Code ? What is interesting is Article 1. Association, Sec.14., Sec 1363 - (i). This bill states that the Civil Code is amended, but under (i) this was always true of the GRCA vis-à-vis our private Villages, in that e.g., (2) shall be entitled to the same access to the joint association’s records as they are to the participating association’s records. However, the GRCA as well as Stein/Baydaline and the State Attorney General effectively denied us this right by stating that the GRCA’s records were “private records maintained for each of the 24 separate villages”.

After a while, I got tired of writing to the SAG and the GRCA Board of Directors --- nobody’s home.

Eileen

Date: Wed, 2 Apr 2003
To: bhebert@clrc.ca.gov
From: LIZSCPM@aol.com (by way of Nathaniel Sterling)
Subject: Board member required to resolve disputes

Dear Mr. Sterling:

I am against having Board members be required to assist in the resolution of neighbor to neighbor disputes for the following reasons:

1. It is difficult to recruit Board members now without requiring them to do additional work.

2. The Board should be able to concentrate on the affairs of the Association as a whole not homeowner to homeowner disputes. This could be very time consuming especially in a large association.

3. Some neighbor to neighbor disputes cannot be resolved due to the unreasonable demands of the parties combined. If this law passes, a Board member would need to respond to the constant requests from members asking for resolution when there is none.

The Board members of the Associations that I manage are very willing to help to resolve differences between homeowners in the community. There are some differences that cannot be resolved because of the individuals involved. Board members have many responsibilities to its members as a whole without being required to act as a policeman, mediator or free counselor. There are plenty of other people and agencies that are better equipped to assist in resolutions.

Please do not add unnecessary burdens to individuals who are volunteering to do a relatively thankless job.

Sincerely,

Liz Franco, CCAM, PCAM

Katzakian Property Management

Stockton, CA

Date: Wed, 2 Apr 2003

To: bhebert@clrc.ca.gov

From: “George Jenkins” <GeorgeJ@jbev.com> (by way of Nathaniel Sterling)

Subject: New Legislation

I do not want to risk my life to stop a loud party or to tell a neighbor to park their vehicle elsewhere. It is the Police Dept that is paid to do this and putting more citizens in harms way is against everything I believe in. Find someone else to do your dirty work I would resign as a board member and I am sure many others would if you put such a law into effect.

George C. Jenkins

Date: Wed, 2 Apr 2003
To: bhebert@clrc.ca.gov
From: "J C Hudson" <hudsonjc60@hotmail.com> (by way of Nathaniel Sterling)
Subject: Fwd: Proposed Amendment to the Davis-Sterling Act re: Neighbor Dispute Resolution

COMMENTS AGAINST THE PROPOSED AMENDMENT TO THE DAVIS-STERLING ACT RE: BOARD MEMBERS MEDIATING DISPUTES BETWEEN NEIGHBORS

To Whom It May Concern:

I was recently made aware of a proposed amendment to the Davis-Sterling Act to require an individual Board member to resolve neighbor to neighbor disputes. I for one have been an active member of my homeowner's association and now currently serve as Vice-President of the Board for my association. I would like to express to you that having had the benefit of both vantage points I find no reason to involve ANY member of the Board in neighbor- to- neighbor disputes and my reasons are as follows:

1. Homeowners who serve on the Board are already taxed with the tasks of running the business of the association i.e., they have a fiduciary duty to exercise sound judgement in acting as stewards of the association's finances and overseeing the day-to-day operations vis-a-vis the management of the association's property/assets. It would be an unjust burden if the law imposed on Board members the weight of acting as a mediator between neighbors. Such a legislation I think would have a "chilling effect" and deter homeowners from serving on Boards as it would be stressful and it would impinge on their personal lives and well-being.

2. Most Boards are comprised of homeowner's who volunteer their time and to ask members of a Board to resolve disputes is really extending the Board's liability because their error or omission or assurances could become the focus of any later litigation that my arise out of the dispute between neighbors. Members of most Boards do not possess the skill nor do most have the legal knowledge and expertise to know what pitfalls to avoid when trying to resolve disputes between neighbors therefore, it is really not wise for them to act in the capacity of a mediator.

3. There will be instances where there maybe a conflict of interest between the Board member mediating the dispute and the person(s) involved in the dispute, in which case the Board member's objectivity is obviously compromised and this would affect any effort towards a fair resolution due to possible bias.

4. Having a Board member step in to resolve disputes really puts them into “the eye of the storm” and conceivably this could place their and their familiy’s safety, security and well-being in jeopardy from possible repercussions from the dispute at issue.

5. If neighbors are unable to resolve disputes between themselves then the proper recourse would be for them to turn to the legal system or retain professional mediation services at their individual expense.

Sincerely,

G. Perrin

SECRETARY OF STATE
KEVIN SHELLEY
STATE OF CALIFORNIA

April 2, 2003

Mr. Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Dear Mr. Sterling:

Thank you very much for soliciting my comments on proposed legislation regarding a "common interest development information center" in the Secretary of State's Office.

I have several concerns about this proposal. First, the Secretary of State's office is a filing office with no knowledge or expertise concerning the needs and requirements of common interest development associations (CIDs) and their members. And, our filing experience with CIDs is only three months old since it is the result of the implementation of AB 643 (Chapter 1117, Statutes of 2002) requiring CIDs to file with our office. This law only went into effect on January 1, 2003.

Secondly, your proposal requires the Secretary of State to serve as a clearinghouse for common interest development information. If this occurs, people telephoning for information are going to expect that staff will be available to answer any questions they may have about these issues.

This means that there will be a need for designated staff to undergo initial and ongoing training to obtain and refine a base of knowledge on this issue so that they can provide information to the public. As a result, this will require initial start-up costs and ongoing costs for staff to field these calls, initial and ongoing training, communications technology, and the cost of the phone calls if there is a toll-free line.

This proposal requires the Secretary of State to provide these services from existing funds. In addition to the costs referenced in the previous paragraph, there would be initial and ongoing costs to place and maintain the required information on the Internet Web page and the automated

answering system. Due to the state's budget situation, we already have numerous vacancies that have not been filled and may not be filled. It would be extremely difficult to take on new responsibilities at this time using existing funds and staff.

Finally, as for using the filing fee charged to Common Interest Developments, it is unclear whether filers would find such an "information center" useful enough to warrant a higher fee, and whether the Legislature would agree to allow the Secretary of State to set the fee to accommodate these costs, and to spend the costs needed from fees collected.

If I can be of further assistance in this matter, please do not hesitate to call.

Sincerely,

MARC CARREL
Assistant Secretary of State, Policy & Planning

ECHO
Executive Council of Homeowners
Of, By and For Homeowners

June 4, 2003

Nathaniel Sterling, Executive Secretary
California Law Revision Commission
400 Middlefield Road, Room D-1
Palo Alto, CA 94353

Re: **Review of Community Association Law**
Alternative Dispute Resolution

Dear Mr. Sterling:

We appreciate the opportunity to comment on staff's tentative recommendation to the Commission regarding existing enforcement provisions in the Davis-Stirling Common Interest Development Act. Given the lateness of this letter and your courtesy in seeking our thoughts, we will keep our comments general and brief.

We have the following fundamental concerns with the proposed recommendation, to each of which we urge the Commission to devote further consideration. Our concerns are:

- The extraordinary extension of prevailing party attorneys' fees to enforcement of broad bodies of California law.

- The concept that individual owners should be able to enforce board-made operating rules.

- The concept that boards of directors should be required by law to involve themselves in every neighbor-to-neighbor disagreement.

- The concept that boards of directors should be required to delegate their enforcement role and responsibility to a single individual, with authority to bind the board (and thus their entire community) to that one individual's discretionary decision.

- The lack of discussion as to how the internal dispute committee and mandatory meet-and-confer concepts in this recommendation would be aligned with the burgeoning number of competing and seriatim dispute resolution procedures that exist in associations' governing documents and the Davis-Stirling Act and, additionally, those that have been newly promulgated in Commission-sponsored AB 512 (Bates).

1602 The Alameda, Suite 101
San Jose, CA 95126-2908
Tel 408-867-3266
Fax 408-867-8817

Attorneys' Fees

Staff notes in its memorandum on this tentative recommendation that it proposes only "minor" changes to Civil Code section 1354. This is to misunderstand the import of the proposal.

Broadly extending attorneys' fees in section 1354 to the enforcement of the Davis-Stirling Act and, an even more complex notion, to enforcement of the entire Nonprofit Corporation Law is an extraordinary proposal, hardly minor. Sweeping away the American Rule can have serious consequences for all potential litigants. We are aware of no other segment of California's citizenry or of nonprofit corporations that are subject to a similar scheme. While we take no formal position on this at the moment, we urge the Commission to request a full briefing on the subject and to give this proposal the exploration and discussion that it deserves.

Owner Enforcement of Rules

This proposal is also hardly minor. It derives from the centuries-old principle (correctly articulated and embodied in existing Civil Code section 1354(a) with respect to the "declaration") that permits any owner of property that is benefited by a covenant running with the land, to enforce it. However, the Commission's proposal is an extraordinary extension of that principle to a corporate board of directors' rules, of unlimited kinds. First impression tells us this is wildly inappropriate. At the very least, the concept demands an examination of its consequences to community life, the social and financial costs, and why owners' existing legal remedies to compel the board to enforce (or change) its rules are not sufficient

Neighbor-to-Neighbor Disputes

We agree with other commentators that placing the board between neighbors in every manner of disagreement is bad policy for California. While boards might voluntarily get involved where they deem it appropriate, mandating that involvement by statute poses significant risk to the social and financial stability of communities. We too agree the principle could chill the volunteer spirit in common interest developments on which the state so heavily relies.

Committee-of-One Decisions

The proposal that boards be required by law to delegate their authority to a single individual to decide every community dispute is insupportable. We know of no legal authority for this concept and believe it is antithetical to both corporate and real property law. We fear it is dangerously unschooled for the Commission to believe that vesting the authority to resolve all disputes in a community association in a single person would not seriously endanger both the corporation and the property rights of every owner in the development.

In certain procedural concepts and related notes that the Commission has proposed in AB 512, we have observed that the Commission somehow believes that owners of property in small communities are entitled to less protection of their property rights. We have never agreed with that position, and this proposal now suggests that the Commission believes that owners of property in huge communities will somehow necessarily be less impacted by decisions of a single board delegatee. This ignores the principles of precedent that apply to communities of whatever size, the unknowable liability inherent in endowing any single agent with binding authority over what might be either a corporate or property interest (or even both), and the undeniable and harmful impact on the ability of associations to adequately manage and insure against risk.

Parenthetically, we have noted with interest the concept of an active internal dispute resolution mechanism for community associations in the tentative recommendation. We think this concept has sound merit. However, the Commission may not realize that communities that currently employ such procedures do so to meet their pre-filing obligations under Civil Code section 1354, not in addition to them as proposed in the tentative recommendation.

Aligning Dispute Resolution Procedures

Frankly, the layers and layers of proposed and existing procedure are now completely out of hand. We urge the Commission to decide once and for all what it believes communities and their associations should do. As you know, ECHO's frustration over the messy and soon-to-be completely ineffectual principles espoused in AB 512 has reached the point where we no longer can support the Commission's effort.

We urge the Commission to re-visit the original reason it looked into the area of dispute resolution in the first place – that something better was needed than what we have now. ***We think, if it does, it will agree that the relatively straightforward and no-nonsense procedure proposed in this tentative recommendation is, so far, the best of the lot, the clearest, and the one most likely to be effective.*** The toothless, voluntary procedures in AB 512 will change nothing, and we are discouraged that the Commission has seemingly moved so far off its original goals. We suspect that, having considered the labyrinthine procedure it devised, the Commission has itself lost confidence in the theories that originally underlay the recommendations it made to the legislature. Proof can be seen in the proposed amendments to AB 512 that would simply let associations continue to do exactly what they do now.

We believe AB 512 should be withdrawn. Community associations need clear, cleanly articulated principles to live by, applicable to all community associations. If we do not provide such principles, we will lose the volunteer leaders of communities across California as they refuse to serve in the face of an overly complex, risk-fraught, and incomprehensible regulatory scheme. Rather, we believe this recommendation and the way it would re-structure dispute resolution in community associations are a much finer example of legislation that provides regulation with the flexibility that the Commission seemingly seeks. At least with respect to

basic statutory drafting, this recommendation comes far closer to realizing the Commission's charge with respect to community association law.

Again, we appreciate your willingness to accept our comments.

Very truly yours,

Sandra M. Bonato
Chair, ECHO Legislative Committee

SMB/

cc: Tyler P. Berding, Esq., President, ECHO
Oliver Burford, ECHO Executive Director
Members, ECHO Legislative Committee
S. Guy Puccio, Wallace/Puccio, ECHO Advocate
The Honorable Patricia Bates, Assembly Member
Skip Daum, CAI/CLAC Legislative Advocate
Karen Conlon, President, CACM

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